



DRIVERS OF ENFORCEMENT IN THE ENVIRONMENT AGENCY

"I find the greatest thing in this world is not so much where we stand as in what direction we are moving."

(Oliver Wendell Holmes, *Medical Essays: The Young Practitioner*. (Houghton, Mifflin & Co., Boston, 1883).



Drivers of Enforcement in the Environment Agency

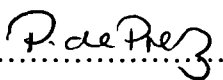
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ABSTRACT

Drivers of enforcement style can be defined as those dimensions of a regulator's social and political environment which play a significant part in influencing its approach to enforcement. Dr Keith Hawkins was responsible for the seminal work in this field, *'Environment & Enforcement'*, a piece of research based on a four year field study of water pollution regulation by the Water Authorities in the 1980s. Hawkins' Water Authorities were superseded by the National Rivers Authority, and more recently the Environment Agency ('the Agency'), the regulator which forms the subject matter of this work. This regulator is charged with the statutory duty to; *'prevent or minimise or remedy or mitigate the effects of pollution of the environment.'*² As this duty implies, the Agency's regulatory jurisdiction now extends beyond the sphere of water pollution to the regulation of waste, and also to the regulation of air pollution matters which statute has categorised as serious or 'prescribed.'³

The aim of this thesis is to apply Hawkins' model of regulatory enforcement to the Agency - the result of which will be both an examination of the prosecutorial practice of the Agency and the forces which shape this practice, and a critical evaluation of the extent to which the Hawkins' analysis of enforcement should be modified to accommodate the features of modern environmental regulation.

Chapter one of this work explores the continuum of enforcement style (from informal to formalised court-centred modes of enforcement) and the notion of 'drivers of enforcement'. The aim of chapter two then is to gauge the Agency's position on the continuum of enforcement style, as either a largely conciliative enforcer or as a sanction-oriented enforcer. The remaining chapters are devoted to the critical examination of the impact of various drivers of enforcement. Chapter 3 assesses the extent to which enforcement style is shaped by the type of violation subject to regulation rather than by 'who does the enforcement.' Chapter 4 turns to the impact of public pressure and public perception of risk on Agency enforcement. This is followed in chapter 5 by an analysis of the extent to which the moral status of offending can influence Agency enforcement. Chapters 6 and 7 are devoted to predicting the impact of enforcement guidance on the Agency's enforcement

¹ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984).

² Section 5 of the Environment Act 1995.

³ See later at 2.2.

practice. While chapter 6 deals with the direct implications of this guidance on Agency practice, chapter 7 explores the further anticipated ramifications of this guidance in terms of an increased likelihood of judicial review of Agency action. Finally, chapters 8 and 9 address the extent to which the style of enforcement adopted by a regulator is bound up with anticipated enforcement outcomes. Chapter 8 explores the ramifications of the court's current sentencing practices on enforcement style, while chapter 9 addresses the modern phenomenon of sanctions imposed by society rather than the courts, and the extent to which they have the capacity to offset any lack of potency in traditional legal sanctions.



Chapter 1

THE CONTINUUM OF ENFORCEMENT STYLES AND DRIVERS OF ENFORCEMENT

"Law may be enforced by compulsion and coercion, or by conciliation and compromise. In the enforcement of regulation, a distinct aversion is noticeable to sanctioning rule-breaking with punishment."

(K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984).p.1).



CHAPTER 1

THE CONTINUUM OF ENFORCEMENT STYLES AND DRIVERS OF ENFORCEMENT

CONTENTS

1.1 Introduction

1.1.1 Regulation of the Environment by Criminalisation

1.1.2 The Meaning of Enforcement

1.1.3 Styles of Regulatory Enforcement

1.1.4 The Compliance - Sanctioning Continuum

1.2 Hawkins' Drivers of Enforcement

1.3 The Merits and Demerits of the *Environment and Enforcement* Model

1.4 The Environment Agency

1.5 The Environment Agency & Drivers/Inhibitors of Enforcement Style

The aim of this chapter is to set this research in the context of the notion of 'enforcement style,' and of Dr Keith Hawkins' findings on enforcement in his 1980s study of the Water Authorities. As the leading author in the area of enforcement style,¹ and consequently of drivers of enforcement, Hawkins' model of enforcement drivers has been chosen as a framework within which to examine enforcement by the Environment Agency. It should also be possible, even at this preliminary stage, to identify areas in which Hawkins' model might be modernised.

¹ A view shared by Gary Slapper and Stephen Tombs in G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999) 169.

1.1 Introduction

The research topic of enforcement drivers, although far from barren,² remains of great importance as an area for new research. Given the accelerated movement of environmental issues up the political agenda in the 20 years since Hawkins' research, it might be expected that much will have changed in environmental enforcement. The drivers of enforcement are fluid and dynamic and will be seen in this study to have altered significantly since Hawkins' investigation, although the reluctance of regulators to use formal styles of enforcement and the moral ambivalence which surrounds environmental offences appear, surprisingly, to have endured. The enforcement drivers explored in this study of the Agency shadow, in part, Hawkins' research. In explaining the factors which motivated enforcement style, Hawkins accorded prominence to the perceived profile of the regulatory population and 'regulatory ambivalence', a concept Hawkins used to refer to the lack of moral consensus which surrounded the regulator's function in pollution control, and the need to appear to be satisfying the conflicting demands of the regulator's subjects and the public. The profile of the regulatory population and 'regulatory ambivalence', according to Hawkins, were together responsible for regulators' general aversion to formal, legalistic enforcement, and his explanation of enforcement and compliance, therefore, focused on the regulator's task of juggling its relationships with the regulatory population and the wider public. In many ways, Hawkins' account of regulatory ambivalence might more aptly be referred to as a study of 'inhibitors' rather than of drivers of enforcement style, for the regulator was portrayed as being subject to a number of external forces which directed it towards an almost predestined style of enforcement in order to ensure increased rates of compliance.

²Amongst the best examples of such research are; E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981), D. J. Black, "The Mobilization of Law." (1983) 2 *Journal of Legal Studies*. 125, W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396, R. Cranston, *Regulating Business - Law and Consumer Agencies*. (Macmillan, Social Science Research Council, London, 1979), C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. 257, J. Fionda, *Public Prosecutors and Discretion: A Comparative Study*. (Clarendon Press, Oxford, 1995), P. Grabosky, & J. Braithwaite. *Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies*. (Oxford University Press, 1986), N. Gunningham. *Regulating Workplace Safety: System & Sanctions* (Oxford University Press, Oxford, 1999), K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), A. Ogus, et al. *Policing Pollution: A Study of Regulation and Enforcement*. (Oxford University Press, Oxford, 1982), I. Paulus, *The Search for Pure Food*. (Martin Robertson, Law In Society Series, London, 1974), G. Rhodes, *Inspectorates in British Government*. (George Allen & Unwin, London, 1981), D. Vogel, *National Styles of Regulation*. (Cornell University Press, Ithaca N.Y., 1986) and B. Wynne, *Risk Management and Hazardous Waste: Implementation and the Dialectic of Credibility*. (Springer-Verlag, Berlin, 1987).

The primary aim of this thesis is to examine the ways in which the profile of the regulatory population and regulatory ambivalence impact on the enforcement style of the Environment Agency, and to develop Hawkins' theme that it is the regulator's political and social environment which predetermines the style of enforcement, rather than 'who does the enforcement.' This theme of environmental forces shaping enforcement style will be extended in this work to the impact of *inter-institutional drivers* or inhibitors (the influence of the courts) and to the implications of *policy guidance* for Agency enforcement.³ The secondary aim of this thesis is to evaluate the extent to which these external drivers of enforcement distort or undermine what must be the central driver of Agency enforcement, that is, the Agency's pursuit of its aforementioned duty of protecting the environment.⁴

1.1.1 Regulation of the Environment by Criminalisation

Before commencing discussion of enforcement drivers, it is necessary to narrow the focus from environmental regulation to environmental enforcement by briefly dealing with the issues of why the imperative of environmental protection is addressed by the criminal law, what is meant by 'enforcement' in the context of environmental offences and how are different regulatory styles to be identified within the panacea of 'enforcement'?

Early private law protections of the environment were restrictive in scope, primarily because of their concern only with the 'owned' environment.⁵ Contamination of land, water and atmosphere were generally only capable of giving rise to legal protection where ownership of land was affected.⁶ These common law mechanisms proved inadequate in safeguarding the environment and motivating change. This is likely to be due to the fact that the protections afforded by the

³ Before assessing the external drivers of enforcement style it will, of course, first be necessary to identify the enforcement style adopted by the Agency. See chapter 2.

⁴ Section 5 of the Environment Act 1995, mentioned in the Abstract.

⁵ See generally on this, P. De Prez, "Incremental Developments in Polluter Negligence." (1998) 5 *Env Liability* 1. Contrast the law's refusal to recognise property in the environment with Bugler's view that; '*the environment is a public property immeasurably more valuable and irreplaceable than an individual's possessions.*' J. Bugler, *Polluting Britain*. (Penguin, London, 1972) at p.175.

⁶ Although actions in public nuisance did not require an interest in land. Actions in private nuisance have been recently confirmed as requiring proof of an interest in the land on the part of the plaintiff; *Hunter v Canary Wharf* (HL) [1997] 2 All E R 426. For the other civil actions, trespass to land (*Gregory v Piper* (1829) 9 B&C 591 - refuse from D's land blew onto P's land and was held to be a trespass), *Rylands v Fletcher* (an independent tort arising out of the case of *Rylands v Fletcher* (1868) LR 3 HL 330 which creates civil liability for escapes from land which cause damage to property) and negligence, some damage to the person or property is generally necessary.

private laws of nuisance and trespass required a plaintiff to possess not only a property interest in the land⁷, but also the substantial resources necessary to fund court action. The existing public law regime of environmental protection legislation, which uses enforcement of the criminal law to protect the environment, was arguably developed to address these shortcomings in the legal framework.⁸

Public regulators who utilise these criminal enforcement mechanisms are agents of social change. They can facilitate the ideological function of the criminal law by using prosecution in a way which will drive changes in conduct and attitudes towards the environment. If an environmental regulator is to succeed in making the criminal law a robust deterrent, it must adopt a style of enforcement which will facilitate this process of social construction in a manner which increases its own credibility as a legal authority, (in order to deter offenders) and increases the moral opprobrium attached to environmental offences.⁹ The interactive relationship between regulatory enforcement, the courts' response to this enforcement and public feeling towards these unlawful acts, is therefore a central theme of this thesis.¹⁰

⁷ Lord Scarman noted in 1976 that, 'English law reduces environmental problems to questions of property.' *English Law - The New Dimension*. (Stevens, London, 1976).

⁸ Works which explain environmental regulation as a response to market failure include; J. Bowers, *Liquid Assets*. (CPRE, 1988), P. Burrows, *The Economic Theory of Pollution Control*. (Martin Robertson, London, 1979), pp.151-156 and A. Ogus, & G.M. Richardson, "Economics and the Environment - A Study of Private Nuisance." (1978) *Cambridge Law Journal*. 284.

⁹ See I. Paulus, *The Search for Pure Food*. (Martin Robertson, Law In Society Series, London, 1974), who argues that progressive stigmatisation is a precondition to effective enforcement of regulatory crimes, at p.135.

¹⁰ The following works engage in some analysis of the ideological role of the criminal law; S. Shute, "The Place of Public Opinion in Sentencing Law." (1998) *Criminal Law Review*. 465, particularly discussion of the case of *Sargeant* (1974) 60 Cr App R 74, where the Court of Appeal held that it was the courts' duty to lead public opinion, at p.77, C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993) pp.15-16, P. Devlin, *The Enforcement of Morals*. (Oxford University Press, Oxford, 1965).

1.1.2 The Meaning of 'Enforcement'

Dictionary definitions of 'enforcement' refer to 'forcing someone to do something,' for example, to obey the law. In the context of environmental regulation, however, 'enforcement' must surely be taken to mean the use of incentives and strategies to *encourage* obedience of the law, for the law does not, strictly speaking, provide means for 'forcing' obedience.¹¹ The primary means for encouraging obedience in British environmental law is the criminal sanction, which hinges on the licence (a prior approval awarded to the person or organisation who will be responsible for the economic activity concerned)¹² and prosecution. A licence is issued to an operator, permitting the performance of activities which would otherwise be unlawful. An offence is committed either by conducting the activity without a proper licence, or conducting those activities otherwise than according to the conditions of that licence.¹³ In order to deter the breach of environmental legislation, regulatory officials are equipped by statute with an armoury of 'enforcement' tools, which include; the powers of revocation or modification of the licence, issuing cautions, prosecution and service of formal notices requiring improvements. Alongside these formal enforcement mechanisms there are non-statutory tools of formal and informal warnings and education and persuasion which can also be used to the same end of increasing compliance.¹⁴ To these mechanisms could be added the use of strategic publicity to encourage compliance, although it is interesting to note that such mechanisms are not specifically mentioned in the Environment Agency's regulatory ladder reproduced at page 9 in fig. 1.1.¹⁵

1.1.3 Formal & Informal Mechanisms of Enforcement

The least formal enforcement response to identified non-compliance is, of course, to ignore the operator's breach. Environment Agency personnel acknowledged in

¹¹ See, for example, Environment Agency (1996) *Introductory Guidance on the Agency's Contribution to Sustainable Development*. Sustainable Development Series SD1 which at 7.1 explains sustainable development, the primary objective of the Agency, in the following terms; "One of the challenges in pursuing sustainable development is to promote ways of encouraging environmentally friendly economic activity and of discouraging or controlling environmentally damaging activity."

¹² P. Grabosky, & J. Braithwaite. *Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies*. (Oxford University Press, 1986) at p.186.

¹³ This framework is used in environmental protection, urban planning legislation, the use of genetically modified organisms, health and safety legislation and the regulation of financial services, to name but a few.

¹⁴ See fig 1.1 at page 9.

¹⁵ Such mechanisms are, however, the focus of discussion in chapter 9.

interview that a 'good' operator who had been responsive to pressure from the Agency could be 'rewarded' by such enforcement inaction.¹⁶ Alternatively, Agency staff could use persuasion. Here, officers might point out the long term benefits of site improvements without actually demanding any change in practice. Such informal strategies of regulatory bargaining can involve enforcers acting '*like salesmen*,' in manipulating the perceived advantages of improvements in order to make them more attractive:

*"We might say to an operator, 'if you do this by the end of the year, I won't serve a variation or enforcement notice on you.' This gives them time to plan the timetable of improvement and they can get tenders in. It is a lot less costly for them to do it this way than to be served with a notice and have to make the improvements in six weeks."*¹⁷

At the opposite end of the spectrum, formal enforcement mechanisms include, primarily, forms of court action. These are relatively expensive mechanisms which Hawkins concluded were only used as '*a last resort*.' Their place in the regime of enforcement adopted by the Water Authorities was more as a shadow lurking behind the negotiation of compliance between operator and regulator.¹⁸ According to Hawkins, officers made use of the fact that the threat of prosecution was implicit in non-compliance, but the use of the threat was rarely called upon:

*"My intention has been to portray the formal process of prosecution as a kind of eminence grise, a shadowy entity lurking off-stage, often invoked, however discreetly, yet rarely revealed."*¹⁹

1.1.4 Styles of Regulatory Enforcement: The Compliance - Sanctioning Continuum

The strategies according to which these enforcement tools are utilised ('styles of enforcement') are commonly described by their 'certainty of enforcement' and specific characteristics of the relationship between regulator and regulated.²⁰ The accumulation of research in this field has repeatedly identified a distinct style of

¹⁶ Communications with Agency officers. Similar observations are made in A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994) p.97 where it is stated that officers supervising an environmental licence can use evidence of breach as a bargaining tool by offering to abstain from enforcing that formal standard in every instance of breach, provided the polluter shows a commitment to improving conditions on his site.

¹⁷ IPC Inspector, June 1998.

¹⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) p.8.

¹⁹ Ibid. at p.191.

²⁰ See R. Baldwin, & M. Cave, *Understanding Regulation*. (Oxford University Press, London 1999) pp.96-101 for a useful summary of the literature on styles of enforcement.

enforcement that Hawkins labelled the 'compliance-based approach,' as being deployed in the administration of regulatory regimes. Croall describes the key characteristics of the compliance-based approach as; "...*infrequent prosecution, strict liability, compliance strategies of enforcement and lenient sentences.*"²¹ According to Hawkins' notion of compliance-oriented enforcement, the purpose was to prevent harm rather than to 'punish an evil', and prosecution was viewed by the enforcer as a sign of 'failure' to achieve compliance by less confrontational means.²² In contrast, the 'sanctioning approach' to enforcement endorsed the relatively frequent use of formal legalistic enforcement and encouraged arm's length regulation. The main purpose behind 'sanctioning' was the punishment of offenders.²³

The more explicit use of penalties in the sanctioning approach to enforcement might suggest its superiority in terms of deterrence, as compared with the informal, non-legalistic approach, which relies on '*infrequent prosecution*' and '*lenient sentences.*'²⁴ Hawkins did not, however, subscribe to this view and drew attention to officers' abilities to deter offenders and attain compliance with the assistance of 'bluff.' Hawkins described 'bluffs' as including; *threatening sanctions with no true intention of using them, threatening the use of powers which do not exist, playing on the unfamiliarity of court proceedings and referring to sanctions which have never been used.*²⁵ The use of bluff resulted in a 'socially manufactured' form of deterrence.²⁶ The lack of knowledge possessed by operators of the enforcement officer's power and status offer rich scope for a variety of 'bluffing' mechanisms:

²¹ H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293, at p.294.

²² K. Hawkins, *Environment & Enforcement* (Clarendon Press, Oxford, 1984), p.35 "*We don't take people to court just like that. It's a history of problems. We've tried everything with them: negotiation, discussion, etc. When we take them to court it's like saying all the other methods have failed.*" (field officer).

²³ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), at p.4. See pp.4-7 for Hawkins' full explanation of the two styles.

²⁴ For examples of the critique of the compliance style of enforcement, see C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993) at p.29. See also on this point, L. Snider, "Co-operative Models & Corporate Crime: Panacea or Cop-Out?" (1990) 36(3) *Crime & Delinquency* pp.373-390, R. Mulheron, "Criminal Enforcement of Environmental Law: Limitations and 'Flat Earth Thinking' Sanctions." (1996) *Queensland Law Society Journal*. 427.

²⁵ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at pp.61-63.

²⁶ *Ibid* p.63. Recent research has confirmed that 'bluffing' in the form of exaggerating the likelihood of prosecution still plays a part in environmental regulation. See A. Mehta, & K. Hawkins, "IPC & Its Impact: Perspectives from Industry." (1998) 10(1) *Journal of Environmental Law* 10(1) pp.61-77.

*"A helluva a lot of bluff is used, said one urban field man. You use what tools you've got to exert what pressure you can. And if it's a bluff it's fine, so long as they don't call your bluff."*²⁷

Bluffing has been documented as being used not only in the context of how likely it is that an operator will be prosecuted, but as a more universal strategy used to exaggerate, for example, the severity of the likely penalty.²⁸

The continuum of enforcement styles described here should not be regarded as an expression of preference for either the compliance-based or the sanction-based position. The continuum is merely a device which can be used to assist the identification of assumptions and ideologies associated with the use of each 'style.' Simplistic portrayals of regulators as 'compliance-oriented' enforcement bodies or 'sanction-oriented' enforcement bodies should be avoided, with reminders that this continuum of enforcement styles stands as no more than a conceptual device, with which to highlight contrasts between extremes.²⁹

²⁷ Ibid at p.61.

²⁸ Y. Brittan, *The Impact of Water Pollution Control on Industry - A Case Study of Fifty Dischargers*. (ESRC Centre for Socio-Legal Studies, Oxford, 1984) at pp.76-77.

²⁹ See further, H. Packer, *The Limits of Criminal Sanction*. (Stanford University Press, 1968). on the dangers of polarisation at p.153.

Fig 1.1 The Regulatory Ladder³⁰

Performance	Risk	Cost	Deregulatory	Regulatory Mechanisms	Examples
Good	Low	Low	High	Ignore	Inspector informed/ accountable discretion
				Inform	Oil disposal video
				Educate	Seminars, papers, leaflets
				Advise	Discussion
				Guide	Guidance notes, waste management papers
				Influence	Licence applications
				Encourage	Public opinion
				Instruct	Licences
				Direct	Licences
				Warn	Code of Practice
				Threaten	Code of Practice
				Sanction	EMAS, licence modifications, operator's licence withdrawal
				Enforce	Licence, fit and proper person; suspension /withdrawal
Poor	High	High	Regulatory	Prosecute	Prosecution policy

³⁰ A device recently used in the Agency's internal guidance. A description of the informal and formal mechanisms of enforcement as they apply to the Agency is provided in Appendix E.

Having set out the meaning and context of 'enforcement style,' it is now apt to turn to the factors which are regarded as determining those styles. Whilst the tendency to adopt a compliance-based style of enforcement in British regulation is generally agreed upon as historically correct,³¹ there has been much dispute as to the drivers of informal, compliance-based enforcement. The exploration of the drivers of enforcement is a valuable process as it facilitates a deeper understanding of the practical and philosophical constraints under which a regulator operates in its enforcement capacity. The following section looks to the work of Doctor Keith Hawkins as a starting point on enforcement drivers in pollution control, with a view to shaping the forthcoming discussion of the Agency.

1.2 Hawkins' Drivers of Enforcement

Hawkins' quest in *Environment and Enforcement* was to examine the ways in which compliance with pollution controls was secured by officers in the Regional Water Authorities.³² His work developed a reactive impression of enforcement, whereby its form was dictated by forces outside the administration of the regulatory body itself. These external forces included, on the one hand, the type of regulatee/the type of deviance with which the regulator was faced:

*"What prompts a sanctioning rather than a compliance response is not who does the law enforcement so much as the sort of behaviour which is subject to control."*³³

According to Hawkins, enforcers adopted essentially similar approaches to enforcement, and the decision to prosecute in one case and not in another was generally due to enforcement officials' views of the operators' conduct.³⁴ For example, officers were much more likely to take a legalistic approach to enforcement where the conduct or regulatee was thought to be blameworthy or unco-operative.³⁵ The structure of the Environment Agency's pollution control function, comprising as it does three regulators which have evolved in very

³¹ See generally the works of; D. Vogel, *National Styles of Regulation*. (Cornell University Press, Ithaca N.Y., 1986), J. Braithwaite, "Enforcing Self Regulation." (1982) 80 *Michigan Law Review*. 1466, G. Richardson, "Strict Liability for Regulatory Crime: the Empirical Research." (1987) *Criminal Law Review*. 295, R. Brown, and M. Rankin, "Persuasion, Penalties and Prosecution: Administrative v Criminal Sanctions", pp. 325-353 in M. Friedland, *Securing Compliance*. (University of Toronto Press, 1990), W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396.

³²K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) p.15.

³³ *Ibid.*, p.6.

³⁴ *Ibid.*, p.7.

³⁵ *Ibid.*, p.6.

different social and political contexts,³⁶ provides perfect scope for testing the idea that it is the perceived behaviour of regulatees rather than the identity of the enforcer that determines enforcement style.

Hawkins' sociological account of compliance and enforcement, also highlighted the external driver of 'regulatory ambivalence.' The ambivalence of regulatory control had a major impact on what officers perceived to be the proper means for pursuing compliance. This ambivalence had two dimensions, 'political' and 'moral'.³⁷

'Political ambivalence' arose out of the fact that environmental regulators mediated between the conflicting interests of different constituencies; namely operators and the wider public. Whilst operators were concerned that regulation should not excessively interfere with the management and profitability of their corporate enterprise, the concern of many factions of wider society was that the regulator must be seen as having the upper hand in the regulatory relationship, and should demonstrate its position of power. For the public, the symbolic act of prosecution was often the only means of satisfying them that the regulator was truly in control. Hawkins recognised that response to this latter demand could be an exercise in artificiality:

*"Organizational self-preservation...makes it imperative for them to manufacture the appearance of activity,...the symbolic reality of impact, the fiction of real power."*³⁸

The dimension of 'moral ambivalence' on the other hand, arose out of the fact that the regulator was responsible for policing criminal offences carved out of conduct which, prior to the recent influx of environmental regulation, had been regarded as entirely legitimate. Not only was the condemned activity of 'polluting' unfamiliar to the realms of criminal sanction, but the offences were often strict liability, rendering the breach of environmental law an imprisonable 'wrong.' The punishment of 'environmental offenders' was, therefore, potentially repugnant to the public conscience.³⁹ Enforcers treading this relatively new path, once again, had to proceed with caution if they were to be seen as having legitimate authority and were to retain the support of operators and the public. This moral ambivalence therefore:

³⁶ See chapter 2.

³⁷ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p.8.

³⁸ Ibid, p.10.

³⁹ To ignore the issue of intent would be to 'shock the moral sense of any civilised community.' O. W. Holmes, *The Common Law*. (Little Brown, Boston, 1880) p.50.

*"...poses the crucial problem of enforcement for regulatory agencies and their field staffs, because their authority is not secured on a perceived moral and political consensus about the ills they seek to control."*⁴⁰

It appears then, that Hawkins' view was one of regulation in which the drivers of enforcement are universal, determined primarily by regulators' attempts to categorise operators as co-operative or deviant, and that the range of enforcement options is also restricted by the social pressures created by regulatory ambivalence; on the one hand, the need to be seen as a credible enforcer in the eyes of the public (preventing over-reliance on informal, non-legalistic enforcement) and on the other, the need to be seen as a legitimate enforcer (preventing over-use of the sanctioning approach to enforcement).

1.3 The Merits and Demerits of the *Environment and Enforcement* Model

Hawkins' model can be ascribed to the consensus tradition⁴¹ of regulatory models, which tend to explain rather than challenge existing enforcement styles and which start from a presumption that prosecution is generally not to be used, given the regulator's ability to enforce independently of the courts. Although nearly two decades old, Hawkins' work still has powerful explanatory force, not least because of its portrayal of regulators in their broader social context rather than in isolation. Regulators are dynamic and responsive, and regulatory behaviour is informed by their response to their regulatory environment, including forces largely beyond their control, such as public opinion and the vagaries of the courts. However, given the common assumption that environmental issues/concerns have 'moved up the political agenda,'⁴² it is expected that Hawkins' conclusions (particularly regarding the moral ambivalence with which environmental offences were treated and the informal styles of enforcement applied to them) will not be capable of being transposed to regulation by the Environment Agency at the brink of the twenty-first century.

⁴⁰ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at pp.12-13.

⁴¹ Other examples of works which can be classified as emanating from the consensus tradition include; A. Ogus, et al. *Policing Pollution: A Study of Regulation and Enforcement*. (Oxford University Press, Oxford, 1982), A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* 259, P. Fen & C.G. Veljanovski, "Positive Theory of Regulatory Enforcement." (1988) 98 *Economic Journal* 1055, and C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. 257.

⁴² See, for example, A. Mehta, "IPC Penalties and Deterrents: The View from Industry." (1997) 9(6) *Environmental Law & Management*. 274. Note also the chart in Appendix A which shows the steep rise in interest in the environment in the titles of Parliamentary Reports in the latter part of the 20th century.

Leaving aside for the moment the social changes which may have outpaced Hawkins' conclusions on environmental enforcement, it is important also to acknowledge that Hawkins' work represents merely one attempt to devise a model of enforcement which explained when and why prosecutions were taken by the Water Authorities. As with any model of enforcement, Hawkins' model necessarily provides a partial view of how enforcement operates, obscuring the importance of other drivers:

*"Models are like spectacles that magnify one set of factors rather than another" and 'lead analysts to produce different explanations of problems that appear.'"*⁴³

Thus, while Hawkins' model magnifies the importance of '*currents of opinion*' toward environmental harm and the perceived probity of the regulated as determining factors of enforcement style, it tends to underplay, for example, the role of the statutory mandate of the enforcement body.⁴⁴ *The minimal reference to legislative mandate in Environment and Enforcement* is due to two factors.⁴⁵ First, *Environment and Enforcement* is a piece of interpretative sociology,⁴⁶ and therefore tends to transcend discussion of the importance of rules in favour of the study of human transactions. Hawkins talks about issues of legality being matters of interpretation and discretion.⁴⁷ His work's sociological emphasis obscures the formative importance of those rules in determining the jurisdiction of the regulator and the framework within which such discretion resides. Second, while emphasis in contemporary regulation is on the deregulation of industry's obligations, the regulators themselves seem to be increasingly subject to direction and guidance.⁴⁸ At the time of Hawkins' study relatively few regulatory mandates existed.

The work of Diver is capable of bringing valuable points to bear on Hawkins' work in this respect, for Diver examines in detail the impact of broadly worded mandates

⁴³ G. T. Allison, *Essence of Decision*. (Little, Brown & Co., Boston, 1971) at p.251.

⁴⁴ For other works which emphasise the importance of rules in explaining the behaviour of administrative agencies see; R. Baldwin, *Rules and Government*. (Clarendon Press, Oxford, 1995) and R. Baldwin, "Why Rules Don't Work." (1990) 53 *Modern Law Review* 321.

⁴⁵ At K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) p.18, Hawkins refers to the existence of a broad legislative mandate but does not carry it through in his analysis.

⁴⁶ *Ibid.* at p.15.

⁴⁷ *Ibid.* at p. xiii.

⁴⁸ Examples of which include; *The Environment Agency and Sustainable Development* (Statutory Guidance issued under s.4 of the Environment Act 1995) December 1995 issued under s.4 of the Environment Act 1995) December 1995, statutory duties contained in the Environment Act (particularly at section 5 and section 37), the Enforcement Concordat. For more detailed discussion of this issue see chapters 6 and 7.

on enforcement behaviour.⁴⁹ He identifies a common type of under-regulation of concentrating on trivial offences to the exclusion of the more serious. In over-regulating peripheral offences, regulators under-regulate offences causing greater social harm, and thereby fail to achieve optimal regulation. The source of this misdirection, according to Diver, is 'goal ambiguity' resulting in 'goal displacement.'⁵⁰ Goal ambiguity exists where broad terminology such as 'public interest', 'necessity' and 'convenience' pervade a regulator's statutory mandate. When no indication is given as to where the regulator should trade-off distributional objectives against efficiency considerations, the regulator responds by a process of 'satisficing.' This is a process of rule-making performed to compensate for the lack of legislative guidance. The ambiguous goals provided by Parliament are replaced by more easily measured indicators of performance such as prosecution or inspection rates. The activity of prosecution or inspection then becomes an end in itself for the regulator, and the trivial offences which are easily discovered or litigated are prosecuted at the expense of those producing more social harm, yet which would be more costly to pursue.⁵¹ The emphasis which Diver lays on a regulator's statutory mandate provides a means of updating Hawkins' model for the purposes of this study.

Other notable contributions to the literature on enforcement style have magnified aspects of enforcement behaviour which Hawkins may be argued to have obscured. Bardach and Kagan's thesis of 'regulatory unreasonableness' is closely aligned to Hawkins' ideas. Their research focuses, however, on the limitations of 'sanctioning styles' of enforcement, as opposed to the effectiveness of informal compliance based regimes. According to Bardach and Kagan, regulatory unreasonableness arises out of strict/literal and legalistic enforcement of over-inclusive standards.⁵² Literal legalistic enforcement is thought to be a symptom of treating all operators as 'monolithic legal entities.'⁵³ The condition produced by legalistic enforcement is,

⁴⁹ C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. pp.257-99.

⁵⁰ Ibid at p.274.

⁵¹ Ibid at p.296. Thus the notion of satisficing demonstrates that high prosecution rates may not necessarily be indicative of over-rigorous enforcement, but can equally be interpreted as a symptom of under-regulation. Some evidence of the goals displacement phenomenon is discussed in the context of the Environment Agency in Chapter 5 at 5.4.5. Ogus has also argued that satisficing may sometimes occur by substituting minimisation of political or social criticism for the original goal of harm minimisation. (A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994)). An account of the extent to which public pressure influences enforcement is given in a P. De Prez, "Public Expectation and Environmental Enforcement: Distortion or Democracy?" (1999) *Environmental Law & Management*. 11(6) 224.

⁵² E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981), at p.71.

⁵³ Ibid at p.81.

allegedly, the destruction of co-operation amongst regulated organisations, demonstrated by either resentment and hostility (even by those operators who were initially compliant), minimal compliance or even a disposition to resist the law.⁵⁴ Flexible, compliance-based enforcement strategies do not produce these difficulties. These criticisms of the sanctioning approach assume, on little evidence, that enforcement is a consensual process, requiring the 'acquiescence' of the regulated.⁵⁵ Bardach and Kagan's rationalisation of infrequent prosecution also ignores the need for general deterrence. If the threat of legalistic enforcement is the linch pin of regulatory power,⁵⁶ court cases must be pursued to reinforce the threat to industry as a whole, and not purely as a means of teaching the unresponsive offender a lesson. In contrast, Hawkins' study showed a preoccupation with symbolic shows of power, and it is this broader notion of enforcement which is preferred in this thesis.

Hawkins portrayed the regulatory process as monopolised by the state regulator. Modern literature on enforcement tends to challenge this assumption, with models of 'mutual enforcement' and 'enforced self-regulation' placing public regulators as the backdrop to enforcement. According to the notion of 'mutual enforcement,' corporate regulation is achieved not primarily by threats of sanction by a statutory body, but by an evolutionary form of self-regulation.⁵⁷ Ayres and Braithwaite argue that enforced self-regulation/mutual enforcement involves standards being increasingly enforced by industry itself rather than the courts.⁵⁸ Regulated industries adopt some or all of the legislative, executive and judicial regulatory functions by; devising their own regulatory standards, monitoring compliance and punishing non-compliance.⁵⁹

The notion of 'mutual enforcement' is clearly of some relevance to contemporary environmental regulation. For operators who flout the law not only risk a court

⁵⁴ Ibid at pp.97-119.

⁵⁵ G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999).

⁵⁶ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p.8 states; "the threat of prosecution lurks however in the background of private negotiations, a threat to be unveiled in cases of unco-operativeness or intransigence."

⁵⁷ I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992).

⁵⁸ A similar model is developed in J.A. Sigler, & J.E. Murphy, *Interactive Corporate Compliance*. (Quorum Books, 1981). Braithwaite's work also has much in common with Blower's notion of 'mutual enforcement' mechanisms (see A. Blowers, *Something in the Air - Corporate Power and the Environment*. (Harper & Row, London, 1984)) and the later work of A. Mehta, & K. Hawkins, "IPC & Its Impact: Perspectives from Industry." (1998) 10(1) *Journal of Environmental Law* 10(1) 61. A. Mehta, "IPC Penalties and Deterrents: The View from Industry." (1997) 9(6) *Environmental Law & Management*. 274.

⁵⁹ I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992).

appearance but, more importantly, the withdrawal of lucrative contracts, retraction of support from investors and insurers and reduced credibility in the commercial marketplace. Although the existence of mutual enforcement mechanisms is not disputed, the extent of their impact is elusive and exceedingly difficult to gauge, and therefore this is an aspect of enforcement not pursued in any great depth here.⁶⁰ Slapper and Tombs argue that faith in the ability of industry to 'self-regulate' is 'misplaced.' They anticipate that industry will use self-regulatory mechanisms 'cynically' and symbolically' to keep state regulators at arm's length. A degree of support for this view arises from the fact that a handful of interviews conducted during this research with representatives of industry, made it clear that industry sought to portray itself as very much affected by mutual enforcement mechanisms such as bad publicity. Nevertheless, they generally had remarkable difficulty in pointing to concrete evidence of such an impact.⁶¹ The concerns this raised led to a preference for Hawkins' traditional view of the public regulator as the central driver of compliance for the purposes of this thesis (although mutual enforcement mechanisms are explored briefly in chapter 9).

Most commentators agree that deterrence has a role to play in pollution law enforcement, yet there is little agreement as to its 'proper' role. While the consensus views of Hawkins tend to defend a minimal use of formal legal mechanisms, contributions to the conflict perspective portray such minimalism to be a sign of weakness. Such commentators regard the co-operative style as dysfunctional, preferring to label it '*prosecutorial nullification*'⁶² as opposed to '*optimal regulation*,' the wording preferred by authors such as Ogus.⁶³ The conflict models tend to focus their gaze on issues of power struggles between institutions and interest groups as necessarily permeating discourse on enforcement style.⁶⁴ For example, in contrast to Hawkins, Wells associates compliance strategies of

⁶⁰ Although these issues are dealt with in chapter 9, and are touched upon at 3.3.3., 3.5 and 5.7.

⁶¹ See further the study by Piesse which attempted to provide evidence of a connection between adverse environmental publicity and the market value of public company shares; J. Piesse, "Environmental Spending and Share Price Performance." (1992) 1(1) *Business Strategy & the Environment*. 45.

⁶² R. Mulheron, "Criminal Enforcement of Environmental Law: Limitations and 'Flat Earth Thinking' Sanctions." (1996) *Queensland Law Society Journal*. 427.

⁶³ Ogus, A. *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994).

⁶⁴ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984). Hawkins commented at p. 192 that he had found little evidence to support the bargaining power models and tended to view his enforcement agencies in any case as being in a very strong bargaining position. Details of the notion of 'regulatory capture' in particular can be found at; A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994) and P. H Schuck, "The Curious Case of the Indicted Meat Inspectors." *Harpers Magazine*. (1972) September, I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992).

enforcement not with efficient enforcement, but with a decriminalisation of corporate offending. The lack of rigour with which regulatory offences are seen to be enforced:

*"...can be used to support the argument that crimes of the powerful are condoned and effectively or even deliberately de-criminalized."*⁶⁵

In a similar vein, Croall shows that the 'lenience' with which strict liability offences are enforced, is exacerbated by the way these offences are processed by the courts.⁶⁶ The legal context of Croall's study was consumer protection legislation.⁶⁷ After visiting 50 hearings, she argued that the use of the lower courts as a venue for regulatory offences reinforced a broad assumption that these infringements were 'trivial.' Croall's study supports Wells' belief that wealth and economic power can effectively deflect the full impact of law enforcement, and thereby tends to undermine the principle that all should be equal before the law. Those whose misdemeanours are counted as 'regulatory' or 'corporate' offences can expect greater lenience in the administration of the law.⁶⁸

Hawkins' thesis is invaluable in exploring the social context of enforcement, including the role of public feeling and antipathy towards these offences. As with most pieces of interpretative sociology, however, issues of power relationships are largely neglected. For example, his work does not dwell on the role of the courts in the administration of sanctions for environmental offences.⁶⁹ Yet, it is the courts that equip legal sanction with its power, or, alternatively, rob it of its impact. Their influence is an important component of the enforcement equation. Their response to the Agency's prosecutions is capable of having a profound effect on enforcement style and the moral ambivalence surrounding environmental offending. Hawkins does make a connection between judicial sentencing and enforcement style in stating that the courts' sanctions were frail in comparison with those available for

⁶⁵C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993).at p.29. See also on this point, L. Snider, "Co-operative Models & Corporate Crime: Panacea or Cop-Out?" (1990) 36(3) *Crime & Delinquency*. pp.373-390.

⁶⁶H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293
⁶⁷(Trade descriptions legislation and weights and measures).

⁶⁸There are many works which support the view that the lower class has a greater risk of officially being defined as criminal, R. Quinney, *The Social Reality of Crime*. (Boston, Little Brown, 1970), E. Sutherland, "Is White Collar Crime, Crime?" (1945) *American Sociological Review*. pp.132-139. P. Yeager, *The Limits of Law: The Public Regulation of Private Pollution*. (Cambridge University Press, Cambridge, 1991) p.7.

⁶⁹Hawkins makes brief reference to the practices of magistrates (K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at pp188-189) but makes no formal link with enforcement behaviour.

*'traditional crimes.'*⁷⁰ Additionally, Hawkins' discussion of the practice of 'bluffing' may be viewed as a consequence of the courts' apathy, in forcing enforcement officials to find more innovative mechanisms of enforcement. Nevertheless, in *Environment and Enforcement* the role of the courts is portrayed as diminutive in shaping enforcement style.

Hawkins' work, is almost inevitably partisan, as participant observation, although a lucrative source of data, is likely to result in an assimilation of the views of the observer and those being observed. This may explain why, although Hawkins is careful to avoid comment on the enforcement practices he discovers, in offering explanations for enforcement style rather than challenging that style, his work appears to be a defence of existing practice.⁷¹ Hawkins' model focuses on how optimal deterrence is pursued by existing enforcement practices but seldom asks whether enforcement strategy could be improved. Herein lies the main limitation of *'Environment and Enforcement.'* In fact, Hawkins' own conclusions beg the question of how the compliance style of enforcement he observed could possibly achieve deterrence. For infrequent prosecution to motivate compliance, the sanctioning itself would surely have to be sufficiently robust to ensure the threat of enforcement was effective. Yet, at Hawkins' own admission, fines imposed by the courts were trivial.⁷² It seems that Hawkins' notion of 'bluffing' may play a part in addressing this concern. If the severity of the fine is exaggerated by enforcement officers, operators may comply with the law's requirements, notwithstanding the frailty of legal sanctions. As operators become more aware, however, of the true levels of fines⁷³ the practice of bluffing in this way will be more difficult to sustain. It is, therefore, becoming increasingly important that enforcement styles not only be reported and characterised, but should be measured in some way against the formal aims of the regulator. Finally, a parallel criticism can be made that in tending to explain and justify existing practice, Hawkins' model is excessively deterministic. The external social forces which shape enforcement behaviour seem to afford no room for the initiative of the regulator to direct or facilitate change in attitudes towards environmental issues.

⁷⁰ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p.12.

⁷¹ G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999). Slapper and Tombs suggest that Hawkins' work belongs to a school of thought which advances compliance based enforcement as the most effective means of enforcement. They also comment that such works tend to arise out of research conducted with the support of, and sometimes the funding of, the enforcement agencies concerned.

⁷² See above.

⁷³ This is increasingly likely given the Environment Agency's pursuit of transparency, increased press coverage of Agency prosecutions and initiatives such as 'The Hall of Shame,' (1999) *The Times*, 22 March (list of top ten polluters).

This thesis attempts to adopt a 'varifocal' approach to the study of enforcement style. Whilst drawing in the main from Hawkins' model and the enduring relevance of political and moral ambivalence, the intention is to look beyond these issues to incorporate more emphasis on factors such as enforcement mandates and the role of the courts in shaping enforcement style. Hawkins' portrayals of enforcement style as wholly predetermined, and enforcement as a state monopoly will also be challenged. A further aim of this work is to step beyond providing a justification of existing practice by asking how the forces which shape enforcement style affect the regulator's ability to perform its function of protecting the environment. In a very loose sense, therefore, this thesis aims to draw some conclusions regarding the effectiveness of current enforcement practices.

1.4 The Environment Agency

The Environment Agency ('the Agency') was chosen as the subject for this work on enforcement drivers because it is, in effect, the successor of the Water Authorities which featured in Hawkins' study. It is important to explain the origins of the Agency to illustrate its importance as the substance of this research.

Prior to 1996, environmental regulation was largely administered by three enforcement limbs:

- Water pollution regulation - the subject of national legislation since 1876⁷⁴ and the strand of regulation for which Hawkins' Water Authorities were once responsible;
- Waste management regulation - legislation in this area not being enacted until 1972⁷⁵; and
- Integrated processes regulation - a composite field of regulation covering discharges to air, land and water, and having its roots in the Alkali legislation of 1863.⁷⁶

The three regimes of pollution control shared a broadly similar framework of regulation; each regime operated a licensing system⁷⁷ and relied on the criminal law to impose sanctions upon non-compliant operators. Yet, these regimes were

⁷⁴ Rivers (Pollution Prevention) Act 1876

⁷⁵ Deposit of Poisonous Waste Act 1972

⁷⁶ Alkali Act 1863.

⁷⁷This system is used by the regulator to authorise emissions and discharges on an individual basis.

diverse; they developed along distinct time scales, they were created on the basis of different institutional models and under discrete legislative regimes, and they appeared to endorse contrasting enforcement policies and strategies.⁷⁸ In 1996, these three streams of pollution control regulation were brought within the jurisdiction of a single inspectorate for England and Wales - the Environment Agency ('the Agency').⁷⁹

When proposals for reform of environmental regulation were being canvassed, four models for an Environment Agency were suggested:⁸⁰

1. a body with responsibility for disposals to air and land only (water pollution regulation would remain independent);
2. a body responsible for overseeing and co-ordinating water pollution regulation and integrated processes regulation (leaving waste management activities to be regulated perhaps by a separate arm of the new body);
3. *"the creation of a fully integrated agency covering all the agencies"*⁸¹ (i.e. waste management, water quality and Integrated Pollution Control and including all the functions of the National Rivers Authority); and
4. a structure incorporating waste management and integrated pollution control functions. This fourth option would exclude from the Agency the functions of water resources management, flood defence, navigation and fisheries.

It was the fully integrated model, embracing both pollution control and water management functions (3), which was adopted for the new Agency. This relatively recent amalgamation of regulatory forces with distinct identities makes the Agency a perfect medium for testing the hypothesis that the dominant driver of enforcement style is the profile of the regulatory population as opposed to the distinct values and culture within each sector of this 'new' regulatory organisation.

1.5 The Environment Agency & Drivers/Inhibitors of Enforcement Style

The chapters that follow will be devoted to examining the overlapping components of enforcement style identified above; the profile of the regulated population and

⁷⁸ D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 175.

⁷⁹ Created by section 1 of the Environment Act 1995. The Act also created a separate regulator for Scotland, the Scottish Environmental Protection Agency.

⁸⁰ House of Commons Environment Committee (1991-2) *Improving Environmental Quality - The Government's Proposal for a New Independent Environment Agency*, Session 1991-92, First Report, Paper 55 (paras 35-37).

⁸¹ Ibid.

moral and political ambivalence and looking at the extent to which they can and do impact on Agency enforcement style. The first step in this process will, therefore, be to assess the Agency's position on the continuum of enforcement style as adopting a primarily sanction-oriented or compliance-based strategy of enforcement. Once the Agency has been attributed with a style of enforcement, the process of exploring the different drivers of that style can begin.

Finally, it is appropriate to say something regarding the anticipated parameters of this research. The topic of enforcement drivers in this research is discussed almost exclusively in the context of the use of prosecution as a means of pollution control. The power to decide whether to prosecute, delegated to regulators on public trust, ostensibly equips the enforcement official with the power to:

*"...oppress the innocent and to shield the guilty, to trouble his enemies and to protect his friends, and to make the interest of the public subservient to his personal desires, his individual ambitions and his private advantage."*⁸²

The magnitude of the discretion to pursue court action or abstain from prosecuting is sufficient in itself to form the basis of a study such as this. A comparison of the effectiveness of other mechanisms of enforcement is outside the scope of this work, but much has been written elsewhere on the interaction and effectiveness of different regulatory mechanisms, such as economic instruments and self-regulation.⁸³ Furthermore, this study cannot be regarded either as an exhaustive catalogue of enforcement drivers or as an attempt to define the relative weight to be attached to each driver, but rather as an attempt to build upon Hawkins' notion that in law enforcement, factors external to the identity of the regulator *determine* regulatory style.

⁸² So said the Supreme Court of Massachusetts in *Attorney General v Tufts*, 239 Mass. 458, 132 N.E. 322 (1921).

⁸³ See, for example, N. Gunningham, & P. Grabosky, *Smart Regulation*. (Oxford University Press, 1998), A. Boyle, "Environmental Growth and Protection of the Environment." in *Environmental Regulation and Economic Growth*. (Clarendon Press, Oxford, 1994), M. Friedland, *Securing Compliance*. (University of Toronto Press, 1990), S. Eden, *Environmental Issues and Business: Implications of a Changing Agenda*. (Wiley & Sons, London, 1996), J. Braithwaite, "Enforcing Self Regulation." (1982) 80 *Michigan Law Review*. 1466 and T.J. Lock, *Environmental Protection: Standards, Compliance and Costs*. (Ellis Horwood Ltd, 1984).



Chapter 2

PLACING THE ENVIRONMENT AGENCY'S PREDECESSORS ON THE SPECTRUM OF ENFORCEMENT STYLES

"(M)uch of (the Agency's) dealings with those on whom the law places duties (businesses and persons engaged in potentially polluting activities) are informal...at an early stage...the Agency's officers will seek to advise and inform...those it regulates...offering advice and support...be sensitive to the needs of business... regulation should involve...the imposition of minimum burdens...and that...the Agency should seek constructive relationships with regulated bodies."

Environment Agency. *Draft Management Statement*,
December 1995



***C*HAPTER 2**

***P*LCING THE ENVIRONMENT AGENCY'S PREDECESSORS ON THE SPECTRUM OF ENFORCEMENT STYLES**

Most studies of enforcement style in British environmental regulation are, at the time of writing, fifteen years old and older. Their conclusions, without exception (to the author's best knowledge) placed environmental enforcement firmly towards the compliance strategy end of the continuum described at 1.1.4. The Environment Agency inherited its pollution control function from three distinct sectors of administration. This chapter seeks to identify the position each of these sectors occupied along the compliance-sanctioning continuum of regulatory enforcement. This largely descriptive section should assist the context of this research in providing an understanding of the enforcement cultures the Agency may have inherited.

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2.1 Introduction

2.1.1 Pre-Agency Regulation of Prescribed Processes

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2.3 Enforcement Style in the Environment Agency

2.3.1 Enforcement Style in Post-1996 Waste Management

2.3.2 Enforcement Style in Post-1996 Water Pollution Control

2.3.3 Enforcement Style in Post-1996 Prescribed Processes Regulation

2.4 Conclusion: Inheritance of Commonalities

2.1 Introduction

Traditionally, the regulatory mandate of environmental legislation has been so vague in its requirements, that enforcement discretion has been relatively unbridled.¹ Thus, when three separate enforcement regimes emerged under distinct legislation, it might have been predicted that they would develop markedly different styles or cultures of regulation.² Legal regulation in this field had developed by creating regimes of control which addressed the environmental components of land, water and atmosphere as distinct media. It is true to say that there was until relatively recently no recognition in the legal system of the global concept of 'environment,' but only of water pollution, air pollution and unlawful deposits on land. Indeed, it was only ten years ago at the Annual Garner Lecture,³ that Patrick McAuslan argued that there was no such subject as environmental law, and that it was impossible to derive any common thread of principle from the legal framework.

This chapter begins its assessment of enforcement style by focusing on the pre-Agency evolution of three arms of pollution control;

- (1) prescribed processes/integrated pollution control (IPC)
- (2) water pollution regulation and
- (3) waste management.

The observations from this chapter are then used in chapter 3 as a background from which to explore the issue of whether enforcement style in the Agency is driven primarily by its inheritance of diverse enforcement cultures or by the characteristics of those it regulates.

¹ C. Koch, "Judicial Review of Administrative Discretion." (1986) 54 *George Washington Law Review* 469.

² See, for example, D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 175.

³ A lecture organised by the then newly established UK Environmental Law Association. See also J. F. Garner, (1992) *Environmental Law - A Real Subject?* *New Law Journal*, p.1718, December 11th.

2.1.1 - Pre-Agency Regulation of Prescribed Processes

Her Majesty's Inspectorate of Pollution: 1987-1996

In 1987, the Industrial Air Pollution Inspectorate,⁴ the Hazardous Waste Inspectorate, the Department of Environment's water pollution control function and the Radiochemical Inspectorate, were united under the title of Her Majesty's Inspectorate of Pollution (HMIP). With 148 staff and a budget of £24 million, HMIP was intended to initiate an integrated approach to difficult industrial pollution at source, whether affecting air, land or water.⁵ HMIP was, then, the first attempt at cross-sectoral pollution control.

It was not until 1990, however, that HMIP was given a legislative framework within which to conduct cross-sectoral regulation in the form of the Environmental Protection Act 1990 (EPA). This Act created a regime of Integrated Pollution Control (IPC); a system which aimed to induce operators to both produce and dispose of waste in a way that would involve minimal impact on the environment as a whole.⁶ Regulations issued under EPA designated a number of processes as 'prescribed,' including energy production, incineration, cement manufacture, processes involving asbestos and petrochemical processes.⁷ Processes involving substantial risk to the environment, by reason of the quantities of chemical used or their hazardous nature, therefore, were to be regulated by IPC, and the most hazardous of these (Part A processes) fell under the remit of HMIP.⁸ The basis of designation for IPC regulation was clearly the potential impact of the process on the environment.⁹ Operators who conducted 'prescribed processes' or dealt with

⁴ Often referred to as the Alkali Inspectorate.

⁵ E. Ashby, *The Politics of Clean Air*. (Clarendon. Oxford, 1981), p.129.

⁶ G. Lyons, *A Review of Part I of the Environmental Protection Act and its Implementation*. (World Wide Fund for Nature, London, 1992), at p.3.

⁷ Environmental Protection (Prescribed Processes & Substances) Regulations 1991, Schedule 1 part A. This classification was qualified by excluding those processes which did not result in discharges to air, land or water or prescribed substances in more than trivial quantities (Regulation 4 - Schedules 1,4,5 & 6).

⁸ Schedule 1 of the regulations assigned the less complex processes such as the finishing of asbestos products, some incineration, mineral crushing and acid etching, to local control. The same authorisation process was used for local control as was used for IPC by the Inspectorate, but in the case of local control, the regime covered only emissions to air. All remaining environmental hazards were to be dealt with according to the specific media concerned; that is Local Authority Air Pollution Control, the National Rivers Authority (water pollution) or local Waste Regulation Authorities (waste management).

⁹ This is also the conclusion of G. Lyons, *A Review of Part I of the Environmental Protection Act and its Implementation*. (World Wide Fund for Nature, London, 1992) at p.3.

radioactive substances, tended to be large corporate entities. Small operators under IPC were the exception rather than the rule, and many of these were owned by large holding companies who would determine the management systems within the small scale operation.¹⁰ The operation of a Part A prescribed process in itself, therefore, usually suggested that large scale processes were being handled.¹¹

Clearly then, IPC created integrated regulation only at the 'top end' of pollution control (HMIP's responsibilities), and therefore gave rise to further fragmentation. Whilst the environmental impacts of 'prescribed processes' were to be assessed as a whole, IPC stripped off segments of the jurisdictions of existing waste, air and water regulators, thereby creating a bizarre two-tier structure of regulation.¹²

One implication of IPC's 'wholistic' approach of integrated regulation was that the focus of control was on the operation of processes and not outputs. Unlike the water pollution controls, there were no 'pollution' or 'output' offences¹³ in IPC. Instead, IPC offences were built around breaches of authorisation; the focus of IPC authorisation conditions extending inside the site boundary and emphasising compliance with site operating requirements. For example, the usual charge in water pollution prosecutions is for, 'causing or knowingly permitting the *discharge* of poisonous, noxious or polluting substances to controlled waters.'¹⁴ Yet, in IPC regulation the legislation creates offences of *operating* a prescribed process otherwise than in accordance with the conditions of the authorisation.¹⁵ The focus of IPC regulation on site management rather than emissions meant that IPC regulation was in a better position to operate a preventive philosophy. The overriding ethos of IPC was, therefore, that releases should be prevented as a first priority, and where prevention was not possible, they were to be minimised and made harmless.¹⁶

¹⁰ Interview with IPC inspector, August 1998.

¹¹ IPC interviewees.

¹² See W. Howarth, "Regulation, Operation and Management: Functions of the Proposed Environment Agency." (1992) *International Journal of Regulatory Law & Practice*. 1(1) 82 pp.82-92. Further complication arose from HMIP's additional regulatory responsibilities for the keeping, use and disposal of radioactive substances under the Radioactive Substances Act 1993, and the disposal of radioactive waste from nuclear licensed sites under the Nuclear Installations Act 1965. This function was shared with the Ministry for Agriculture, Fisheries and Food and the Welsh Office. From 1987 until 1989, the Inspectorate also regulated discharges to watercourses by the former water authorities. In 1989 an independent regulator for water pollution was created (see 2.1.2), but HMIP retained responsibility for the discharge to sewers of special category effluent (otherwise known as red list substances). See s.120 Water Industry Act 1991.

¹³ Where the emphasis was on 'end of pipe' matters such as the content and characteristics of a discharge to water.

¹⁴ S.85(1) Water Resources Act 1991.

¹⁵ Subsections 6(1) and 23(1) Environmental Protection Act 1990.

¹⁶ Parliamentary Office of Science and Technology (1996), *Safety in Numbers?: Risk Assessment and Environmental Protection*. Report 81, p.4.

Enforcement - The legislation for IPC imposed enforcement duties of a limited nature on HMIP; to review authorisations, to vary authorisations where original conditions of the authorised process had changed, and to serve prohibition notices where they believed there was an imminent risk of serious pollution.¹⁷ It is clear that these duties tended to structure enforcement activities rather than prescribe enforcement outcomes, thereby maintaining the wealth of discretion enjoyed by the inspector.

Both HMIP, and its forerunner the Alkali Inspectorate, were consistently criticised for their 'cosy relationship' with regulated industries.¹⁸ These criticisms stemmed in part from the co-operative relationship which the inspectors appeared to have developed with regulated organisations.¹⁹ Bugler,²⁰ writing in 1972, identified the Inspectorate with a very low public profile, neither appearing in the telephone directories nor operating in marked buildings.²¹ Public cynicism towards the regulator was also the result of its refusal to release emission data identifying specific companies. Inspectors treated such information as the property of the relevant company and protected it from public scrutiny.²² For example, although since 1878, a Royal Commission had recommended the publication in annual reports of recorded emissions from named factories,²³ the Inspectorate was very reluctant to engage in this type of publicity. This apparently protective attitude towards industry was undoubtedly due in part to the fact that the Public Health Act 1936 punished officers' divulgence of effluent details to the public by up to three months' imprisonment.²⁴ In contrast, the only sanction available for river pollution at that time was a financial one.²⁵ This provides a stark illustration of the

¹⁷Subsection 6(6), s.10 and s.14 of EPA 1990.

¹⁸ See HC Hansard March 16 1972, Tam Dalyell (Labour MP), col. 908-916, and particularly at 913 where he suggests that "*flexible officials sometimes put public health and safety at risk rather than jeopardise relationships with polluters.*" M. Frankel, *Social Audit - A Special Report: The Alkali Inspectorate*. (Social Audit Ltd, London, 1974). For further criticisms of the Inspectorate along these lines see generally the Social Audit Report (above) and Bugler, J. (1972) *Polluting Britain*. Penguin, chapter 1, 'Industry's Ally,' pp.3-31, particularly pp.17-27.

¹⁹ To the inspectorate, this relationship was clearly the strength of regulation;

"The inspectorate...was manned by scientists, people of the highest calibre, who achieved such a relationship with industry that Britain was able to boast of being in the forefront of nations dealing with environmental problems." Hansard, 1988-89, vol.143, col. 355.

²⁰ J. Bugler, *Polluting Britain*. (Penguin, London, 1972).

²¹ Ibid at p.8.

²² Royal Commission on Environmental Protection (1976) *Air Pollution Control: An Integrated Approach*. Cmnd 6371, para 125.

²³ HC 1878 (C2195 - I) XLIV.

²⁴ There is still an offence of disclosure of trade secrets under s.34 of the Radioactive Substances Act 1993.

²⁵ Hansard HC March 13 1972, col. 204.

distribution of priorities between environmental protection and commercial interests, and suggests the blame for secrecy should not be levelled at the regulators, but at their legislation.

*Enforcement Statistics*²⁶ - Of the three pre-Agency pollution control regimes, it is HMIP, the national regulator of IPC, which is most closely associated with the compliance style of regulation and regulatory capture.²⁷ What evidence is there to support HMIP's reputation for extensive reliance on the co-operative approach to enforcement?

In its last five years, HMIP prosecutions were raised from the negligible levels of the pre-1990s²⁸ to a range of between twelve and fifteen per year.²⁹ This increase to double figures in 1991 coincided with the claiming of costs for the time spent preparing cases for prosecution, a practice which only began in April 1991.³⁰ HMIP did not have a legal department as such, but employed local solicitors to initiate prosecutions when necessary.³¹ The generally low level of court action was perhaps in part due to this lack of a legal nucleus within the regulatory body and the inhibiting effect of being unable to recoup legal costs.

Information on enforcement rates of HMIP is difficult to piece together. Methods of reporting enforcement and incident statistics in *HMIP Quarterly Reports* changed over time, but it is possible to say that for the period from April 1995 to December 1996, a total of 896 IPC 'incidents' were recorded, and three prosecutions were brought. This is a prosecution rate of 0.3%.³² However, 'incidents' includes only public reports of pollution incidents which, when substantiated by inspectors, are

²⁶ See Chapter 11 for an assessment of the qualified importance to be attached to enforcement statistics.

²⁷ See, for example, D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 174 at p.175 and O. Lomas, "National Rivers Authority - Her Majesty's Inspectorate of Pollution - Integrated Pollution Control - Freedom of Access to Environmental Information." (1990) *Utilities Law Review*. 116.

²⁸ Nought to two.

²⁹ See Appendix A detailing rate of HMIP prosecutions.

³⁰ National Audit Office (1991). *Control and Monitoring of Pollution: Review of Pollution Inspectorate* HC 637 90-91 vol.XXXVIII, and G. Lyons, *A Review of Part I of the Environmental Protection Act and its Implementation*. (World Wide Fund for Nature, London, 1992) at p.46. The record fine for an HMIP prosecution was the £150,000 ordered against *Coalite* in 1996 for their disregard of minimum incineration temperatures resulting in the local emission of dangerous dioxins.

³¹ HMIP Annual Report 1991-2.

³² See also A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994) at p.95 where Ogus similarly forms an 'impressionistic' prosecution rate of 0.05% in relation to regulatory offences generally.

recorded as pollution incidents.³³ These figures then, include no reference to infractions which did not result in pollution, incidents discovered by inspection visits and not reported by the public, and indeed many infractions reported to the regulatory body by the company itself.³⁴ Records of pollution incidents then represent a very poor estimate of the total number of instances of unlawful conduct, but they are all that is available at this time. HMIP formulated its own incident ratios for IPC, but once again, incidents only included allegations of pollution by the public which were confirmed on site inspection. HMIP's incident ratio compared recorded pollution incidents with the number of IPC authorisations. As of December 1995, there were 1855 authorisations in existence.³⁵ The table below shows an incident ratio of around 15:100 authorisations for 1995-96.

³³ Interview with IPC/RAS inspector, May 1998.

³⁴ See 3.2.2 where it is demonstrated that self-reporting is an integral feature of IPC regulation.

³⁵ HMIP Quarterly Report, Third Quarter 1995-96, p.8.

Fig 2.1 IPC Incident Ratio - April 1993 - December 1995³⁶

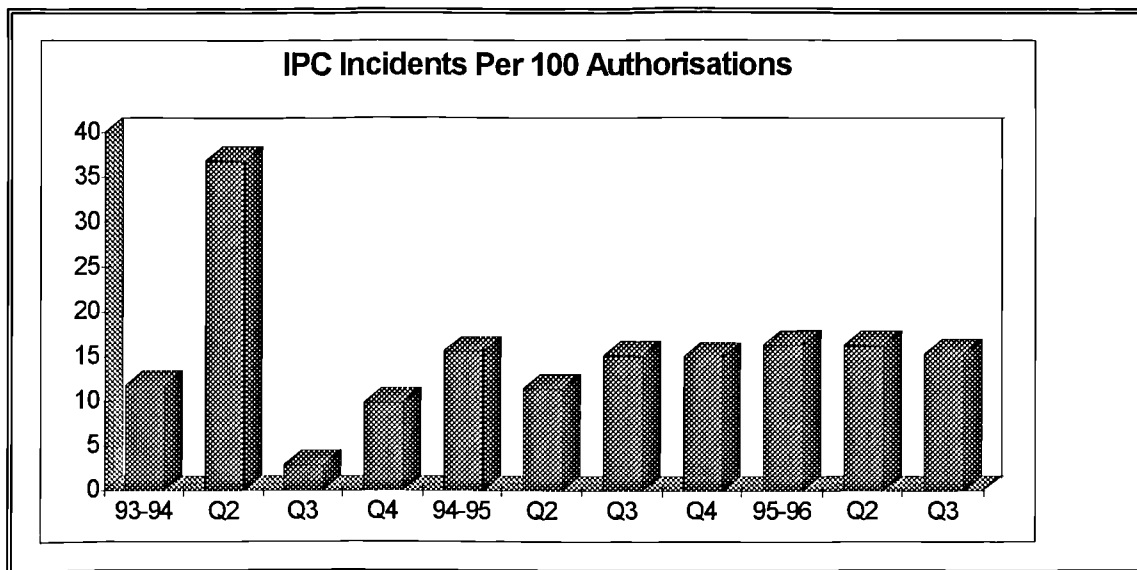


Fig 2.2 HMIP Prosecutions 1989-96³⁷

<i>Year</i>	<i>No. of Prosecutions</i>	<i>No. of Enforcement & Prohibition Notices issued</i>
<i>1989-90</i>	<i>0</i>	<i>5</i>
<i>1990-91</i>	<i>1</i>	<i>3</i>
<i>1991-92</i>	<i>12</i>	<i>7</i>
<i>1992-93</i>	<i>14</i>	<i>36</i>
<i>1993-94</i>	<i>12</i>	<i>56</i>
<i>1994-95</i>	<i>15</i>	<i>78</i>
<i>1995</i>	<i>15</i>	<i>80</i>

Interviews conducted by the author with enforcement officers, tended to confirm a trenchant view of HMIP's enforcement strategy, and a perception that there were

³⁶ HMIP Quarterly Reports 1993-1995.

³⁷ Includes IPC prosecutions under EPA 1990, radioactive substances prosecutions under Radioactive Substances Act 1993 and those under the Health & Safety at Work Act 1974. Source - HMIP Annual Reports.

real cultural differences between the three pre-Agency regulators.³⁸ Officers who had originated from waste regulation and water pollution control often had misgivings about the effectiveness of HMIP's approach:

*"IPC is a lot different. It's about self-regulation and self-monitoring. I don't know how well that works. I wouldn't trust [X Ltd] with self-monitoring, I just wouldn't trust them to tell the truth about their discharges."*³⁹

*"My only perceptions were from the rumours, like everyone else, that HMIP was on the lax side."*⁴⁰

One officer when asked what views he had on HMIP regulation replied:

*"They are from the private sector and react differently to breaches. If an incident happens at the weekend, they don't rush to visit it until Tuesday morning. They don't 'enforce' regulation in the same way as we do. One incident involved solvents being lost into the ground. HMIP were satisfied clean up was done when solvents were still filling holes in the ground. They have their priorities all wrong."*⁴¹

Another Agency officer described the HMIP approach to enforcement as being to prosecute only when there was; *'a cloudburst disaster or when someone was killed.'*⁴²

These intemperate views are perhaps not surprising, given the distinctions in staff profile between those working 'at the coalface' in IPC and those in similar posts in waste and water.⁴³ HMIP's legislation required the chief inspector to employ persons, *'having suitable qualifications as he thinks necessary.'*⁴⁴ The term 'suitability' was interpreted as requiring a minimum of five years experience in

³⁸ This reputation is confirmed in D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 175 at p.174 and O. Lomas, "National Rivers Authority - Her Majesty's Inspectorate of Pollution - Integrated Pollution Control - Freedom of Access to Environmental Information." (1990) *Utilities Law Review*. 116.

³⁹ Water Quality interviewee, 1997.

⁴⁰ Waste Management interviewee, June 1997.

⁴¹ Water Quality interviewee, December, 1997.

⁴² Agency officer interview June, 1997.

⁴³ As regards HMIP's predecessors, the Alkali Act did not allow Land Agents or anyone engaged in the manufacture of alkalis to be appointed as inspectors (s.8 Alkali Act 1863). This was presumably to prevent a conflict of interest arising between the regulated and regulator. The Act did not however preclude the practice of appointing all inspectors from industry itself, provided not engaged in alkali manufacture.

⁴⁴ S.16 EPA 1990.

industry.⁴⁵ The requirement of a minimum of five years experience in industry is still in force in IPC regulation within the Agency. As a result, IPC staff are on average ten years older than their 'colleagues' from water pollution and waste management regulation who are often recruited straight after their degree or post A-levels. Moreover, IPC personnel claim much higher 'costs.'⁴⁶ At the time of writing, an IPC Inspector's costs were £124.87 per hour, much higher than the rate for either Agency solicitors (£90 per hour) or Environmental Protection Officers (£40 per hour). Such distinctions were thought to cause feelings of superiority, resentment and friction between enforcement staff and may therefore explain the critical views expressed of HMIP's enforcement practices.⁴⁷ This approach to recruitment may also be largely responsible for HMIP's reputation of being the least likely of the three pre-Agency bodies to prosecute. It is tempting to infer that HMIP's policy of recruiting from industry resulted in regulatory capture through recruitment policy is in operation, as business values were likely to be fairly well entrenched in newly recruited inspectors. Grabosky and Braithwaite's study of Australian regulatory bodies lends some support to this view. Their study established an inverse correlation between the rate of formal enforcement adopted by a regulator and the proportion of its staff with prior experience in industry.⁴⁸ At this stage, it seems quite feasible that the profile of enforcement personnel, along with the practice of announced inspections,⁴⁹ their assumed role as guardians of industrial information and their legislative mandate (the flexible concept of 'best practicable means')⁵⁰ all contributed to an enforcement style which corresponded very closely to the 'compliance strategy' outlined by Hawkins.⁵¹

⁴⁵ HMIP Annual Report 1994-95.

⁴⁶i.e. the fees charged to the operator by the Agency when an officer is called out to attend a pollution incident.

⁴⁷ IPC officer, September 1997.

⁴⁸ See P. Grabosky, & J. Braithwaite. *Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies*. (Oxford University Press, 1986), figure 4, p.209.

⁴⁹ See 3.2.2 (ii).

⁵⁰ The basis of control in this arm of regulation has always been the concept of best practicable means (BPM); the reality of pollution control requiring a balance to be struck between the costs and benefits of pollution abatement for industry and for society. (See RCEP Fifth Report: Air Pollution - An Integrated Approach (1976), para 16). The discretion afforded by BPM meant the provision was unenforceable through the courts. Indeed, as recently as 1991 it was observed that in nearly 50% of cases the notes detailing the BPM for a given process were missing or incomplete. National Audit Office (1991). *Control and Monitoring of Pollution: Review of Pollution Inspectorate* HC 637 90-91 vol.XXXVIII, p.17).

⁵¹ See 1.1.4.

2.1.2 - Pre-Agency Regulation of Water Pollution

The National Rivers Authority: 1989-1996

Prior to 1989, the functions of both supply of water and sewerage services and of the enforcement of water pollution controls rested with single organisations; the Water Authorities which were the subject of Hawkins' study. Ironically, the pollution regulators in this instance were also the largest polluters, a conflict which, it was suggested, compromised their enforcement function.⁵² In 1989, the Government planned to privatise the Water Authorities. This was considered to be the best way of raising the much needed capital for improving water quality, and for upgrading outdated sewage treatment works. Originally, plans for privatisation involved the marketing of the whole of the Authorities as they stood. It was brought to the Government's attention, however, that European Community law required pollution control functions to be vested in a 'competent authority,' a concept which did not necessarily encompass privatised companies.⁵³ The need for a re-think led to the proposal of a 'National Rivers Authority', a new independent body, to inherit the regulatory functions of the Water Authorities. The 'new agency' idea was successful in helping to subdue fears concerning the accountability of the privatised water companies; a factor which facilitated Parliamentary approval of the privatisation package.⁵⁴ The National Rivers Authority ('the NRA') was created by the Water Act 1989. Parliament's aspirations for the NRA were for it to change the face of water pollution regulation by resolving the conflict of interest which had existed in the Water Authorities and proving to be a stronger regulator than the Water Authorities, being more ready to prosecute:

*"[T]he acceptable face of the Department of the Environment...tells us that it is important that there be a greater readiness to prosecute and to make a more effective use of powers that already exist."*⁵⁵

⁵²T. Birch, *Poison in the System*. (Greenpeace, London, 1989) p.50. "[I]t is beyond human endeavour to be required to fine oneself for breaking the law." (Hansard 1988-89, vol.149, col.506).

⁵³ N. Haigh, *Manual of Environmental Policy*. (London, Longman, 1992), at 4.1-4.5.

⁵⁴R. MacRory, "The Privatisation and Regulation of the Water Industry." (1990) 53(1) *Modern Law Review*. 78.

⁵⁵ Hansard 1988-89, vol.143, col. 398. The NRA developed a more integrated approach to consent setting, applying site-specific rather than uniform standards, which aimed to protect the varied uses to which a particular watercourse was put. This was known as the Integrated River Basin Management system, see Parliamentary Office of Science and Technology (1996), *Safety in Numbers?: Risk Assessment and Environmental Protection*. Report 81, at p.5.

The NRA had eight regions staffed by ten times the head count at HMIP.⁵⁶ It was distinct from the other two limbs of pollution control because of its substantial operational functions. Its responsibilities outside pollution control included: water management;⁵⁷ navigation;⁵⁸ land drainage;⁵⁹ fisheries;⁶⁰ flood defence;⁶¹ angling; recreation; and conservation.⁶²

One major reform under the Water Act 1989 was that the NRA was the first water regulator to be placed under a specific statutory enforcement duty. The option to adopt a duty to enforce the law against individual polluters was rejected⁶³ in favour of a more liberal 'outcome-oriented' duty of enforcement. The duty was expressed as a 'result duty', to ensure that statutory water quality objectives (SWQOs) were achieved.⁶⁴ The NRA's means of ensuring such objectives were met, was of course by the control of discharges by licensing and by enforcing the law against dischargers when they were found to be exceeding their licensed capacity. Pressure groups viewed the duty as creating powers to force change on polluters through the local courts. However, for the duty to be enforceable, SWQOs had to be set. The Royal Commission on Environmental Pollution recommended that;

*"...the objectives themselves should be tightened progressively, to reflect increasingly ambitious targets for water quality."*⁶⁵

In preparation for the development of quality objectives, the Surface Waters (Rivers Ecosystem) (Classification) Regulations 1994 were issued, in order to classify the overall quality of rivers. But nearly eight years since the formal introduction of the SWQO concept, no such objectives have as yet been developed. The 'result' duty imposed on the NRA, was, therefore, a hollow one.⁶⁶

⁵⁶ A. Weale, *The New Politics of Pollution*. (Manchester University Press, Manchester, 1992) at p.101. In 1994 the NRA had 7,700 staff according to National Audit Office. *National Rivers Authority: River Pollution from Farms in England 1994-95*, HC 235 p.6.

⁵⁷ Water Industry Act 1991 and Water Resources Act 1991.

⁵⁸ Pilotage Act 1987, Sea Fish Industry Act 1951.

⁵⁹ Land Drainage Acts 1991 and 1976.

⁶⁰ Salmon Act 1986, Wildlife & Countryside Act 1981, Salmon & Freshwater Fisheries Act 1975, Diseases of Fish Acts 1983 and 1937.

⁶¹ Regulated by local bylaws.

⁶² This thesis is however only concerned with the pollution control functions of the water regulator.

⁶³ This duty would have taken the form of a mandatory order that the NRA should ensure people who cause pollution bear the cost of remedying that pollution and take steps to prevent its recurrence.

Hansard, 1988-89, vol.149, col. 1007.

⁶⁴ Section 84 WRA 1991.

⁶⁵ Royal Commission on Environmental Pollution. *Freshwater Quality* (1992), Sixteenth Report. Cmnd 1966.

⁶⁶ Plans for implementing the first SWQOs in eight pilot catchment areas have undergone consultation in 1996-97, Environment Agency Annual Report 1996-97, p.42, but at the time of

As the focus of consent conditions was the content and characteristics of what was discharged from an outfall, NRA regulation 'followed the discharge.'⁶⁷ As the fact of the NRA's jurisdiction contemplated a polluting activity, it would perhaps have been inappropriate to place the authority under an overriding objective of 'pollution prevention', as HMIP had been. Their objective was rather to keep pollution within the national and international limits, having regard to the tolerance of the specific watercourse. This became known as the 'assimilative capacity' approach.⁶⁸

Enforcement - Of the three pre-Agency regulators, it is the NRA who were considered to employ the greatest degree of legalistic enforcement style, needing little prompting to initiate formal enforcement action,⁶⁹ and of being '*almost robotic*,'⁷⁰ in their prosecution practice. What evidence is there to support this reputation for a sanctioning approach to enforcement?

The NRA engaged a team of in-house specialist lawyers, which inevitably facilitated its approach to legal enforcement. From its inception, the NRA demonstrated an apparently stealthy approach to enforcement of pollution controls, with one of its first prosecutions raising a record fine of £1million.⁷¹ The rate of polluter prosecutions soared within the first two years of NRA regulation, showing an increment of **83%** on their first year (see fig 2.3). These factors confirmed an apparently strong emphasis on court action against unlawful pollution. The compliance-based approach to regulation, discussed in chapter 1, attempts to resolve issues of unlawfulness without recourse to prosecution. This, of course, precludes the testing of the legislation in the courts. The sheer number of binding precedents obtained during the NRA's existence, on water pollution laws which had remained largely untested since their original enactment in 1876, is testimony to the NRA's increased emphasis on court-centred enforcement.⁷²

writing, SWQOs have yet to be applied to a single stretch of river. See 'Chancellor in tricky waters over water pollution charges', (1998) *ENDS Rep* 277, February, pp.21-24.

⁶⁷ If a site were to stop producing a discharge, the consent would automatically be revoked after a year.

⁶⁸ Parliamentary Office of Science and Technology (1996), *Safety in Numbers?: Risk Assessment and Environmental Protection*. Report 81.

⁶⁹ D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 175.

⁷⁰ Interviewee from industry. Supported in N. Carter, and P. Lowe, "The Establishment of a Cross Sector Environment Agency", in T. S. Gray, (Ed) *UK Environmental Policy in the 1990s*. (Macmillan Press, London, 1995) at p.50.

⁷¹ *NRA v Shell (UK)* (1989) Liverpool Crown Court (unreported).

⁷² *NRA v Yorkshire Water Services* [1994] HL 3 WLR 1202; *CPC(UK) v NRA (CA)* [1995] Env LR 131; *NRA v Taylor Woodhouse* [1994]; *NRA v Alfred McAlpine* [1994] UKELA Journal Winter 1995, 34; *Attorney General's Reference No 2* [1995] 2 All ER 1000; *NRA v Wright Engineering; R v Dovermoss* [1995] CA Env LR 258.

The publicly stated policy which influenced the National Rivers Authority's decisions to prosecute was that:⁷³

- (i) examples by potential defendants of blatant disregard for pollution laws and unresponsiveness to NRA guidance and advice should result in prosecution (*culpability*); and
- (ii) incidents causing serious damage to the environment or threats to human health should be prosecuted regardless of fault (*environmental damage*).

The NRA measured severity of environmental damage using a formal three-fold categorisation of pollution incidents,⁷⁴ with Category 1 incidents (major incidents often involving fishkill of over 100 of notable species) being the most serious and most readily prosecuted. Surprisingly, these major incidents were by no means always prosecuted,⁷⁵ but court action would always be 'considered.' Caution or prosecution would be considered in Category 2 cases (those involving significant impact on the environment). Many Agency officers, when interviewed, commented that the count of dead fish resulting from an incident was used to determine which cases should be prosecuted. The use of quantitative mechanisms in enforcement strategies was criticised by some waste management officers as tending to produce an element of arbitrariness in enforcement decision making.⁷⁶

The NRA brought water pollution prosecutions at a rate of between four and five hundred per year,⁷⁷ a significant increase on former prosecution rates of the Water Authorities.⁷⁸ In the last three years of the NRA's existence, water pollution

⁷³ National Rivers Authority (1994). *Discharge Consents and Compliance Strategy*. HMSO at pp.57-58.

⁷⁴ For further details see Appendix D.

⁷⁵ Reasons for not prosecuting category 1 incidents may be simply lack of a traceable source of the pollution or legal/evidential problems. For example, the contamination of the public water supply at Hereford and Worcester (the 'Wem' incident) which was thought to originate from the Vitalscheme site, was a category 1 incident which was not prosecuted. (Hereford & Worcester WRA Annual Report 1994-95 at p.20). This was thought to be because of difficult legal arguments relating to the discharge consent possessed by the company. Discussions with an NRA solicitor revealed another category 1 incident which had not resulted in prosecution because of the water company's argument that they had been given verbal consent to discharge the substance, and the NRA could not prove otherwise.

⁷⁶ Interviewees July 1997 and September 1997.

⁷⁷ With the new responsibilities for investigating contaminated land sites, the complexity of the contaminated land enforcement provisions may mean increased reliance on water pollution offences instead.

⁷⁸ 89 prosecutions were brought nationally in 1981, and 129 in 1982, but rising to 339 by 1987. See T.J. Knowland, *Changing the Guard: Institutional Change in Water Pollution Control*. PhD Thesis

prosecutions resulted in conviction in 96% of cases.⁷⁹ From this, it is possible to propose a third factor which specifically informed NRA prosecution policy - that of the likelihood of conviction. Prosecution was generally only embarked upon when the enforcement team were very confident that the ingredients of the offence were fulfilled. Nevertheless, the NRA made an immediate impact in the courtroom, doubling their prosecution rate in their second year and reaching an all time high with 536 prosecutions in 1991-92.⁸⁰ Despite the increased use of prosecution by the National Rivers Authority, as compared with its predecessors, *Friends of the Earth* complained that, when measured against the number of reported water pollution incidents, the degree of formal action taken was not sufficient:

*"The persistent rise in the number of pollution incidents demonstrates the threats facing our rivers. There is an urgent need for tough legal standards to protect our streams and rivers. Actions speak louder than words - in spite of increases in pollution incidents the prosecution record of the NRA shows that too many polluters are being let off the hook."*⁸¹

Certainly, in isolation, the increase in enforcement statistics seems to suggest a strict approach to enforcement. Yet, there was still in fact an '*enforcement to substantiated pollution incident*' ratio of only around 1%, despite the fact that any water pollution incident is, *prima facie*, an offence.⁸² In 1995, the Waste Regulation Authorities had brought more prosecutions than the NRA, but failed to attract the same attention.⁸³

(East Anglia University, 1993) at p.265. Source - Department of Environment Digest of Environmental Protection and Water Statistics 1986 - Pollution Report No.9 (HMSO, London, 1987).

⁷⁹ Hansard HC 27/6/95: 830 prosecutions brought over past three years with 789 successful. See R. Cranston, *Regulating Business - Law and Consumer Agencies*. (Macmillan, Social Science Research Council, London, 1979) at p.116, who notes a 90% success rate in consumer protection prosecutions.

⁸⁰ This figure may have been due to the fact that the NRA could only prosecute the water companies after 1991. Hansard 1988-89, vol. 143, col.495.

⁸¹ Roger Lilley; Industry and Pollution Campaigner Friends of the Earth - FoE Press Release (Web Site) 1995. See Appendix A detailing prosecution rates measured against incidents reported. Approximately one quarter of reported incidents are not confirmed by the National Rivers Authority.

⁸² Fig 2.3 shows the prosecution rate to range from 0.9% to 1.8% of reported incidents. A discharge which is not in accordance with a consent is an offence; s.85(1) and s.88(1) Water Resources Act 1991.

⁸³ See appendix A.

Fig 2.3: Water Pollution Prosecutions 1989-97⁸⁴

Year	Number of Prosecutions	Number of WQ Incidents ⁸⁵	Percentage of Incidents Prosecuted
1996-97	235 ⁸⁶	20,158*	1.1%
1995-96	271	23,463*	1.15%
1994-95	316	35,291	0.9%
1993-94	423	34,296	1.2%
1992-93	435	32,254(approx)	1.4%
1991-92	536	29,524(approx)	1.8%
1990-91	490	29,000(approx)	1.7%
1989-90	292	28,000(approx)	1.0%

Enforcement officers who had worked in waste management or IPC were questioned with a view to authenticating or disputing the view of the NRA as a legalistic enforcer. These interviewees tended to suggest that the view of the NRA as employing a relatively formal style of enforcement, had been overstated:

"The NRA were not the heroes the public believed them to be. The Shell prosecution⁸⁷ was largely responsible for their public image as a strong regulator. Ninety percent of their prosecutions were in fact for people fishing without a licence. These defendants were easy meat, with insufficient funds to properly defend themselves. The legal department could achieve a Magistrates' conviction very easily. They

⁸⁴ These statistics are taken from the National Rivers Authority Annual Reports 1990-1996 and the Environment Agency Annual Reports 1996-1998. Reporting practices changed in 1995 from financial years (April - April) to calendar years. For the years 1995-97, the number of 'incidents' detailed represents the *substantiated* incidents only, and it is these by which the prosecution rate is calculated for these two years.

⁸⁵ i.e. reported incidents rather than substantiated incidents.

⁸⁶ Again, this figure relates only to successful prosecutions, as detailed in the Environment Agency Annual Report 1997.

⁸⁷ Op cit at n.71.

ignored the factory polluting the river upstream unless prosecution would be high profile."⁸⁸

The NRA's concern with 'incidents' and 'discharges' rather than issues of site management, made the collection of evidence to support court action much easier than was considered to be the case in IPC or waste. The NRA approach is frequently described as being 'end of pipe'; "*You stick a limit on it (the discharge), and then when the limit is exceeded, you take a prosecution.*"⁸⁹ In contrast with this relatively 'black and white' approach, HMIP's approach was to focus on the internal workings of the site, not primarily on what was emitted from that site:

*"In IPC you set a limit knowing that it may not be met all the time, and knowing that it gives them (industry) pain to achieve it. IPC is not about pure limit breaches, but the underlying causes for the breach. If a prosecution is brought it is because there has been a management failure at the site."*⁹⁰

These comments suggest that the NRA's legislation had succeeded in making legalistic enforcement a relatively uncomplicated process, meaning that this regulator was particularly well placed to bring a steady flow of prosecutions. Once again, it appears that a distinct regulatory culture had developed in the NRA due to its enabling legislation which facilitated increased resort to prosecution.

2.1.3 - Pre-Agency Regulation of Waste

Waste Regulation Authorities: 1990-1996

Prior to 1991, waste management regulation was afflicted with the same conflict as the Water Authorities had been. The concurrent responsibilities of Waste Disposal Authorities for both disposal operations and the regulation of those very activities, struck at the heart of regulatory impartiality. This problem was addressed by the creation of Waste Regulation Authorities ('the WRAs') by Part II of the Environmental Protection Act 1990.⁹¹ Regulation of waste management remained with local authorities but, as had happened with water, the functions of municipal waste disposal and local regulation were separated to ensure greater regulatory independence. Waste Disposal Authorities ('the WDAs') became private companies, wholly owned by the local authority. WDAs would compete with the

⁸⁸ Waste Management interviewee, June 1997.

⁸⁹ IPC interviewee's perception of NRA enforcement, June 1998.

⁹⁰ IPC interviewee contrasting IPC enforcement with NRA enforcement, June 1998.

⁹¹ S.30 EPA 1990.

private sector for any waste disposal work and Waste Regulation Authorities would be responsible for the regulation of waste disposal and management activities in the region.⁹² The allocation of waste disposal and waste regulatory functions to separate departments within local authorities did not obliterate all conflict of interest in waste regulation. The level of strictness with which WRAs enforced waste regulations was likely to be influenced by the Councils' general desire to attract inward investment to the region. A strong regulator could adversely affect local growth.⁹³ This incompatibility of goals undoubtedly contributed to the fact that many WRAs hardly ever used prosecution.⁹⁴

Enforcement - As a diffuse, locally constituted sector of regulation, the WRAs did not have an enforcement reputation as such. Certainly, they did not share the NRA's reputation of strict policing of the environment. What evidence can be gathered about enforcement style in the WRAs?

Whilst general statements from some of the old WRAs on enforcement confirm a compliance-based approach, there were many proactive authorities who were bringing the same number of formal enforcement actions as the regions of the NRA.⁹⁵ Their fragmented structure, based on local authority boundaries, meant that it was the WRAs for whom integration within the Agency presented the biggest

⁹²Aside from conflicts of interest, many more of the limitations of COPA were addressed by the new Act. Offences were broadened to cover not only 'deposits' of waste, but the treating, keeping or disposing of controlled waste other than in accordance with a waste management licence (s.33(1) EPA 1990). A duty of care was imposed on all parties involved in handling waste. The provisions required that steps should be taken to prevent the escape of waste, that waste should be transferred only to authorised persons, and that steps should be taken to ensure other parties in the chain did not breach the duty of care. Breach of the duty was an offence (s.34(1) EPA 1990). The new waste management licences attracted a 'subsistence fee' which was used to help finance waste regulation activities such as site inspections (s.41 EPA 1990). WRAs were placed under express enforcement duties to ensure that conditions of waste management licences were complied with, and that licensed activities did not cause; pollution to the environment, harm to human health or become seriously detrimental to local amenities (s.42). This was a significantly broader enforcement objective than that contained in COPA, which had been concerned only with the water environment and public health. The new regime required WRAs to vet all licence applicants to determine that they were fit and proper persons to hold a waste management licence in terms of their compliance history, technical competence and financial means (s.74 EPA 1990). Waste management licence holders could no longer surrender their obligations at will but could be required to fulfil site aftercare obligations (s.39 EPA 1990).

⁹³This was a point raised by a number of waste management interviewees who agreed that this factor contributed to any reluctance by WRAs to prosecute licensed operators.

⁹⁴ The same pattern seems true of the County Councils in Ireland who were also responsible for waste regulation prior to the Environmental Protection Agency. In 1994 they were reported as having a policy of; '*persuasion rather than prosecution*', and had not prosecuted any of the three biggest polluters in Ireland who were between them responsible for 1,121 breaches that year. See *The Sunday Times*, 28th August 1994.

⁹⁵See fig 2.4.

challenge. Very little information has been collated on WRA enforcement policy or practice as a whole. The following section draws from interviews with waste management personnel and local annual reports of the WRAs to give some insight into waste management regulation across the regions.⁹⁶

The WRAs utilised prosecution policies in staff manuals which were drafted with reference to guidance from the Crown Prosecution Service (CPS) code of practice.⁹⁷ While certain broad themes within those policies were recurrent throughout the country, there was a significant disparity between certain elements of those policies, evident both in the annual reports and in practice. Each Authority differed in size, procedures and staff grading. While some WRAs had a large number of full-time staff, others had no officers working in regulation full-time.⁹⁸ As to legal staffing, the local WRAs relied on in-house local authority lawyers for legal services (unlike the NRA) for whom environmental cases were only one of many priorities. In fact, waste offences seemed to have been fairly low on Council agendas and their solicitors were often unfamiliar with the waste legislation.⁹⁹ Local firms of solicitors were brought in when necessary.¹⁰⁰

Enforcement consistency had long been a controversial issue in waste regulation. Before the 1990 reforms¹⁰¹ there were 199 waste disposal authorities in the UK, as compared with 26 in West Germany and 30 in Italy.¹⁰² There was concern that so many authorities could not act consistently and coherently.¹⁰³ Even when the number of authorities was drastically reduced by the Environmental Protection Act, there was inevitably variation in the WRAs' construction of their powers and duties,¹⁰⁴ for example, as to when there would be a threat of pollution to the environment. Some WRAs addressed their 'duties' to inspect licensed sites¹⁰⁵ as paramount in their resource allocation, and treated enforcement 'powers' which related to unlicensed waste operators as secondary. There were always other bodies who could enforce the law against offences related to waste (e.g. the Health and Safety Executive,

⁹⁶ These annual reports are on file with the researcher.

⁹⁷ For details of which see later at chapter 6.

⁹⁸ A. Qadeer Khan, "The Environment Agency and the Waste Regulatory Functions" NSCA Conference paper (1994).

⁹⁹ Interview with Waste Regulation Officer, June 1997.

¹⁰⁰ Interview with waste regulation officers, January 1997.

¹⁰¹ Environmental Protection Act 1990.

¹⁰² Hansard 1989-90, HC vol. 165 2nd reading of the Environmental Protection Bill, p.27.

¹⁰³ Ibid.

¹⁰⁴ HC Hansard, Second Reading of the Environment Bill, 18th April 1995, Mr. Malcolm Chisholm.

¹⁰⁵ S.42 EPA 1990.

local environmental health officers, local planning authorities), so some WRAs tended to exclude enforcement matters from their priorities.¹⁰⁶

There was no legal requirement for WRAs to make their enforcement policies public. These policies were to be found in internal staff manuals (private) or sometimes annual reports (public). In either case, enforcement policies were being developed with little central guidance, for example:

- The WRA for **Cheshire** stated in its internal enforcement policy that it would prosecute offenders when a *deliberate* attempt to deceive, mislead, pollute, evade payment or profit from the offence could be shown;¹⁰⁷ while
- **Nottinghamshire's** WRA stated that it was prepared to prosecute offenders where unauthorised activities have resulted in, or were likely to result in, pollution to the environment or danger to public health.¹⁰⁸

So, it seems that while some Authorities matched prosecution with a particular *mens rea* and the directive of punishing offenders (a sanctioning style of enforcement), others viewed protection of the environment as their primary aim and assessed cases according to the risk posed (a compliance-based style of enforcement).¹⁰⁹ Further inevitable barriers to consistency included the perceived differences in regulatory environments *between regions*. *One officer interviewed referred to a difference in approach between the Metropolitan WRAs and those which regulated the rural Shire Counties*. While operators in the Metropolitan Boroughs could often not afford to comply with the law, those in the Shires were often wealthier and were considered to be more amenable to persuasion and education on issues of compliance. It was suggested that urban Authorities tended, therefore, to operate with a greater emphasis on sanctioning styles of enforcement.¹¹⁰

¹⁰⁶ Agency officer interview, October 1997. See also Staffordshire WRA's draft prosecution policy (as of 1995) which mentioned the availability of prosecution to other bodies as a factor in determining whether prosecution by the WRA was in the 'public interest.'

¹⁰⁷ Unreferenced copy of prosecution policy sent to researcher.

¹⁰⁸ Nottinghamshire WRA Annual Report 1994-95, p.30.

¹⁰⁹ Interviewed WRO agreed they represented a 'very mixed bag.'

¹¹⁰ Waste management interviewees September, 1997 and October 1997. As regional enforcement bodies, WRAs were recognised by Government as lacking central guidance. For this reason, they were made subject to the supervisory powers of the Secretary of State (s.68 EPA 1990) and were required to report their activities annually (s.67 EPA 1990. Not all WRAs complied with this duty, but of those that did, many supplied their past reports when requested. This was an invaluable source of information which so far unfortunately is not so far proposed to be followed in like form by the Agency). In 1991, the Government also required the WRAs to organise themselves into non-statutory voluntary groups (s.102(4) of the Local Government Act 1974). Eight of these groups were created to

The following extracts from WRA Annual Reports for the years 1993-1995 clearly reflect the general theme of informal enforcement:

*"The WRA saw legal proceedings as a last resort to solve a particular problem and took pride in resolving issues without recourse to the law. In this sense a higher number of prosecutions could have been regarded as failure, not success."*¹¹¹

*"The majority of incidents can be resolved satisfactorily through site visits, discussions and follow up letters without the need to take legal proceedings."*¹¹²

*"Prosecutions are taken as a final resort where other enforcement action, such as serving statutory notices fails to control the situation."*¹¹³

*"The WRA tries to carry out the regulatory role by education and assistance wherever possible."*¹¹⁴

*"[T]he WRA considers the serving of enforcement notices as a last resort preferring a 'prevention rather than cure' approach."*¹¹⁵

*"Enforcement action is undertaken only when the Authority cannot gain compliance with the legislation or licence conditions by negotiation. It is always the Authority's policy to communicate with industry about the problems it has, in order to resolve them without the need for court action."*¹¹⁶

Again, as with HMIP, we can see that prosecution was often viewed by the WRAs, very much as a final option. There is a consistent preference for a conciliatory

co-ordinate the enforcement activities of their member authorities, and were constituted by locally elected members from the County Councils.

¹¹¹ Leicestershire WRA Annual Report 1993-94 at p.28.

¹¹² Staffordshire WRA Annual Report 1993-94. p.18.

¹¹³ West Yorkshire WRA Annual Report 1993-94, at p. 5.

¹¹⁴ Lincolnshire WRA Annual Report 1993-94 at p. 7.

¹¹⁵ Durham WRA Annual Report 1994-95, at p.10.

¹¹⁶ Nottinghamshire WRA Annual Report 1993-94 at p.8.

approach, with the use of prosecution being reserved for cases where all other methods had failed. A survey conducted of published WRA prosecution policies in early 1996,¹¹⁷ just before the commencement of the Environment Agency, revealed a shared focus on operator culpability and a twin track strategy;

(a) Focus on Culpability - Most authorities distinguished degrees of fault in descending order: deliberate illegality; blatant disregard for the law; differing degrees of carelessness (from negligence to simple mistake); and ignorance of the law. Prosecution was, therefore, a likely response to deliberate unlawful activity and least likely where the offence was committed out of ignorance.¹¹⁸ A number of the WRAs worded their general prosecution policy as taking court action where; *"there has been a serious risk of pollution, a blatant unauthorised deposit or a repeated offence."*¹¹⁹

The element of deliberate offending was thought to be escalating in response to the increased cost of legitimate waste disposal routes,¹²⁰ a fact which perhaps explains the general increase in waste prosecutions (fig 2.4). Profiles of waste regulation prosecutions also show a much greater use of powers against directors and other company officers than is evident in prosecutions under water pollution and the integrated pollution control regimes.¹²¹

(b) Twin Track Approach - Clearly then, any reluctance on the part of the WRAs to prosecute did not extend to all cases. In particular, a more formalistic enforcement approach was taken to unlawful deposits without a licence, than to deposits which were in contravention of an existing licence. In some regions the former would prompt immediate prosecution, whereas the second would be met

¹¹⁷ The author wrote to all the WRAs requesting details of their prosecution/enforcement policies. A great number replied, many referring to a digest of these policies contained in their annual reports.

¹¹⁸ Prosecution was not generally considered to be appropriate where the offence was committed out of ignorance. See, for example Cleveland WRA Annual Report 1994-95 at p.113 where the WRA gave genuine or understandable ignorance and new or changed legislation as situations where prosecutions would generally be inappropriate.

¹¹⁹ For example, Devon WRA Annual Report 1994-95, at p.16, repeated almost word for word in Tyne & Wear Annual Report 1994-95 at p. 15 and Cumbria 1994-95 at p.16.

¹²⁰ A fear that was borne out in some WRAs by an increase in incident investigation rates at the time when the landfill levy was proposed (Lincolnshire WRA Annual Report 1994-95 at p.1).

¹²¹ Certainly, in the context of the prosecutions observed in the course of this research (detailed at chapter 6) all charges against directors or management were in waste management cases. The vast majority of WRA Annual Reports described some of their prosecutions as against directors because the offence was committed with the director's consent, connivance or was attributable to his neglect (see s.157 EPA 1990). This is also supported by P. Jewkes, (1996) 4 *Environmental Liability*, 87, where this tendency is attributed, at least in part, to the fact that waste management companies are very often one man operations.

with more tolerance.¹²² Nottinghamshire WRA's enforcement policy stands as an example of this, stating that prosecution would normally follow unauthorised activities which have resulted in or were likely to result in, pollution to the environment or danger to public health.¹²³ This seemed partly to be the result of an assumption that everyone knew waste could not be disposed of anywhere, and that unauthorised activities were therefore deliberate.¹²⁴

An incident described in a prosecution memo¹²⁵ illustrates the comparatively protracted nature of enforcement relating to *licensed* sites. The defendant was eventually prosecuted for failing to take precautions to prevent the escape of special waste. The incident giving rise to the prosecution occurred in 1993. Yet, fifteen months earlier, a WRA officer had observed two streams of acid flowing down a railway embankment from the site. This incident was considered by the officer to be '*likely to cause pollution and a harm to human health,*' and was presumably, therefore, considered to constitute an offence,¹²⁶ but invited only a warning letter. By the time of the prosecution, the director had been informed several times of the need for improvements to be made to the site to prevent such an escape. In another case, the WRA had repeatedly demanded that the defendant company stay within the licence limits for the volume of waste permitted to be stored on site. The company was prosecuted only after the waste stored on site had risen to thirteen times the permitted limit!¹²⁷

Infractions of licence provisions which did attract prosecution as the immediate response by WRAs, tended to involve incidents attracting significant public concern and an impact on public health. One of these concerned the emission of fumes from a wet air oxidation plant which caused a number of members of the public to suffer headaches, sore eyes and throat and two people to leave work for the day.¹²⁸ The

¹²² Nottinghamshire and Walsall WRA Annual Reports.

¹²³ Nottinghamshire WRA Annual Report 1994-95 at p.30.

¹²⁴ Cleveland WRA Annual Report 1994-95 at p.111.

¹²⁵ From a West Midlands WRA.

¹²⁶ S.33(1)(c) EPA 1990.

¹²⁷ Press Release - Waste Management Hazardous Waste Unit: Walsall - 'Company Fined for Dumping Waste,' 1996 .

¹²⁸ The prosecution of a licensed waste disposal site at Birmingham Magistrates' Court 1994. Another such case involved a chemical reaction at a waste disposal/treatment facility which produced an orange cloud. The incident again produced significant public concern, three sore throats and caused a child to develop an allergic reaction. Compare this with the strategy generally employed for unlawful activities on *licensed* sites (in Cambridgeshire WRA's Annual Report.1994-95, p.10). A waste transfer station had been depositing putrescible waste in contravention of licence conditions, despite several notifications from the WRA which had been '*routinely ignored.*' Two notices, including one for suspension of the licence, were served. Prosecution followed, resulting in a £250 fine. A further

differential treatment of violations on licensed and unlicensed sites supports Hawkins' conclusion that regulators tended to use a mix of compliance and sanctioning styles of enforcement.¹²⁹

The chart below (fig 2.4) shows that, despite the fact that the local WRAs did not share the NRA's reputation of being prosecution-minded in their approach to enforcement, waste management prosecutions outnumbered water pollution cases from 1993-95. There is, however, little information from which to derive a suggestive prosecution rate. There is certainly evidence that WRAs were dealing with a poor level of compliance with duty of care provisions, particularly in the waste management industry.¹³⁰ The WRAs which were to become the North West region of the Environment Agency, did produce incident statistics for their last year of operation. These show that out of 1,864 complaints received, 61 prosecutions were taken, a prosecution rate, therefore, of **3.2%**. There are no totals for infractions of waste management legislation as a whole, only for complaints received from the public. As has already been noted in the context of HMIP's prosecution statistics, use of these figures to estimate the frequency of court action, is likely to produce an exaggerated prosecution rate.¹³¹

notice was served and the waste finally removed by the WRA at a cost of £10,000. These costs have still to be recouped from the licence owner.

¹²⁹ See the discussion in chapter 1 on this. The tendency not to prosecute a breach of licence where no damage was caused is reinforced by the legislation itself which suggests administrative sanctions such as partial or total revocation or suspension of licence for this offence. Section 42(5) EPA 1990 which authorises the WRA to require compliance with the licence condition within a specified time limit and s.42(6) authorising suspension or revocation of the licence where non-compliance continues.

¹³⁰ 'Duty of Care Rules on Transfer Notes Flouted', *ENDS Rep* 251 December 1995, p.13

¹³¹ At 2.1.1.

RATE OF WASTE MANAGEMENT PROSECUTIONS

Years 1996-7 are projected on the basis of statistics provided by individual Agency regions responding to waste management surveys (see appendix A).

Fig 2.4: Waste Management Prosecutions 1991-97¹³²

Year	Number of Prosecutions
1996-97	241(254) ¹³³
1995-96	282 ¹³⁴
1994-95	400
1993-94	442
1992-93	360
1991-92	262

Finally, interviewees from the Agency were questioned as to their impressions of enforcement by the WRAs. The recurring remark made by interviewees was the lack of a centralised approach to regulation and uncertainty in the application of the legislation:

*"WRAs have a similar approach to us but their legislation is more complicated, not as good as ours."*¹³⁵

In support of this, it can be pointed out that although the concept of waste regulation is 25 years old, the central issue of what constitutes 'waste' is far from resolved:

¹³² Statistics obtained for 1995-96 were from the Waste Management survey conducted by the author and detailed in the Appendix, figures for 1991-94 were obtained from National Association of Waste Regulation Officers internal circular, 7th November 1994, figures for 1994-95 came from an unidentifiable source, and for 1996-97 from the Environment Agency Annual Report 1996-7.

¹³³ This figure relates only to successful prosecutions as stated in the Environment Agency Annual Report 1997. The figure in parentheses is the estimated total prosecutions for this year according to a national survey conducted as part of this research.

¹³⁴ This figure is an estimate based on a national survey conducted during the course of the research, and is an attempt to fill a gap in official statistics.

¹³⁵ Water Quality officer.

*"The new special waste definition is proving far more time-consuming. The old test allowed an instantaneous decision. We now need to look up substances in a British catalogue of waste, a document which cost £12 million to produce."*¹³⁶

Gathering evidence of an offence often presented great difficulties in waste regulation, as the offence often related to reports of an odour, whereas with water quality, public reports were usually prompted by something visual which was capable of being photographed.¹³⁷ These difficulties of interpretation and evidence gathering undoubtedly played a role in maintaining the compliance style of enforcement. It seems, therefore, that the legislative mandate of the WRAs has been important in shaping the enforcement style of the regulatory body.

2.2 A Legacy of Fragmentation?

The development of environmental regulation prior to 1996 has been highly fragmented. The growth of regulation for separate media has been spurred by ad hoc events¹³⁸ rather than a concerted effort to create an integrated system of environmental protection. The first major step towards integration, the IPC regime, gave rise to further fragmentation. For whilst the environmental effects of prescribed processes were to be regulated as a whole, IPC stripped off segments of the jurisdiction of water, waste and air regulators, creating a bizarre two-tier regulatory structure.

Despite this legacy of fragmentation in regulatory structure, the information collated in this chapter tends to suggest that the differences between the regulatory styles of the Agency's predecessors have been exaggerated;

1. NRA prosecution policy used the same concepts of *serious harm* and *serious fault* as was used by HMIP and the local WRAs.
2. Some Agency personnel felt the NRA's reputation was a result of careful and strategic publicity; capitalising on the 1989 Shell prosecution which attracted a £1million penalty, and the dogged pursuit of unlicensed anglers.

¹³⁶ Waste Management interviewee, June 1997. See also (1996) *ENDS Report* 257 June at p.36, 'special waste guidance thin on key details' and the recent caselaw providing further elaboration on the meaning of 'waste'; *Mayer Parry v Environment Agency* (1998) QBD *The Times* December 3rd, *Criminal Proceedings Against Tombesi (C304/94)* [1997] 1 All ER (EC) 639 (ECJ) and *Inter-Environnement Wallonie ASBL v Region Wallonie (C129/96)* [1998] 1 All ER (EC) 155 (ECJ).

¹³⁷ See Lancashire WRA Annual Report 1994/95.

¹³⁸ Such as plans to privatise the utilities and the need to resolve conflicts of interest.

3. HMIP, as a body limited to the supervision of the most advanced industrial processes, could not compete with the prosecution profile of a regulator responsible for the majority of discharges to controlled waters. The scale of HMIP's jurisdiction and staffing mean that direct comparison of its enforcement statistics with those of the NRA is unfair. Comparison of prosecution rates (HMIP 0.3% and NRA around 1%) suggests a distinction which is smaller than is generally supposed, although the statistics are unsatisfactory, being founded on a bias which is likely to grossly over-estimate real prosecution rates.
4. Meanwhile, waste regulators were outstaging the NRA in prosecution statistics but, possibly due to their fragmented local structure, were less well positioned to attract national publicity.

2.3 Enforcement Style in the Environment Agency

The final step in this section of the research is to compare what has been documented about these regulatory sectors with what appears to be happening in these sectors since their amalgamation in the Environment Agency. Officers from each regulatory sector of the Agency were asked to express their preferences for formal (prosecution and notice serving) or informal mechanisms of enforcement (persuasion, education and recommending improvements) (see figs 2.5-2.7).¹³⁹

2.3.1 Enforcement Style in Post-1996 Waste Management

When waste management officers were surveyed on the relative importance they attached to education, persuasion, prosecution, warnings, notices and recommendations in achieving compliance, there was some evidence that they placed slightly more emphasis and importance on prosecution and formal notice serving as their primary enforcement tools (6.5% and 2% respectively) than did their counterparts in IPC (now known as the 'prescribed processes sector') (0%).¹⁴⁰ Their selection of informal mechanisms as of primary importance to them was, however, not greatly different to what might have been expected from prescribed processes; 36.9% chose education, 19.5% chose persuasion and 23.9% chose recommendation of improvements. This is consistent with the emphasis on compliance-oriented enforcement observed in the WRA Annual Reports.

¹³⁹ For further details of the survey and survey results see chapter 11 and the appendices, section D.

¹⁴⁰ Question B6.

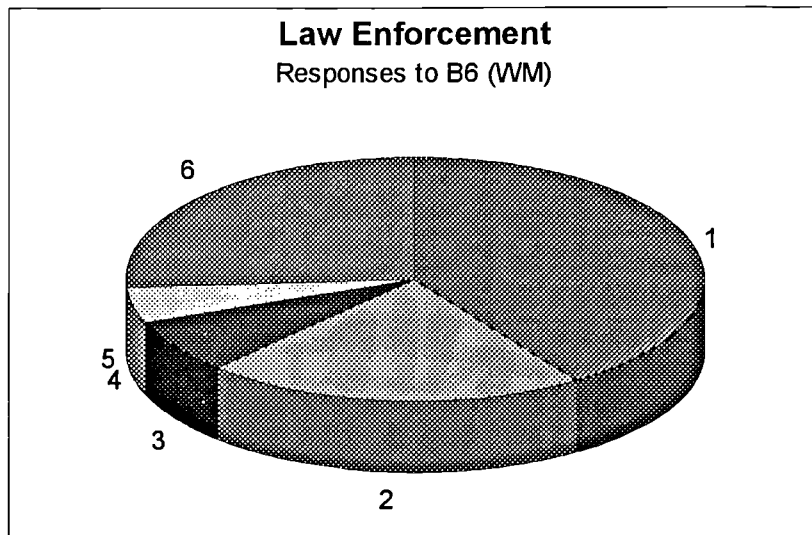
2.3.2 Enforcement Style in Post-1996 Water Pollution Control

Respondents from the water pollution arm of the Agency again associated strongly with the use of informal enforcement mechanisms. **52%** of these respondents chose education as the most important enforcement mechanism with a further **33%** electing persuasion and **15%** choosing the recommendation of improvements. No respondents in this sector chose prosecution or enforcement notices and only **3%** favoured 'threatening formal action' by the use of warnings. Once again the importance attached to sanctioning mechanisms of enforcement is minimal, confirming the water pollution regulator as a compliance-oriented enforcer, despite its reputation as a predominantly legalistic enforcer.

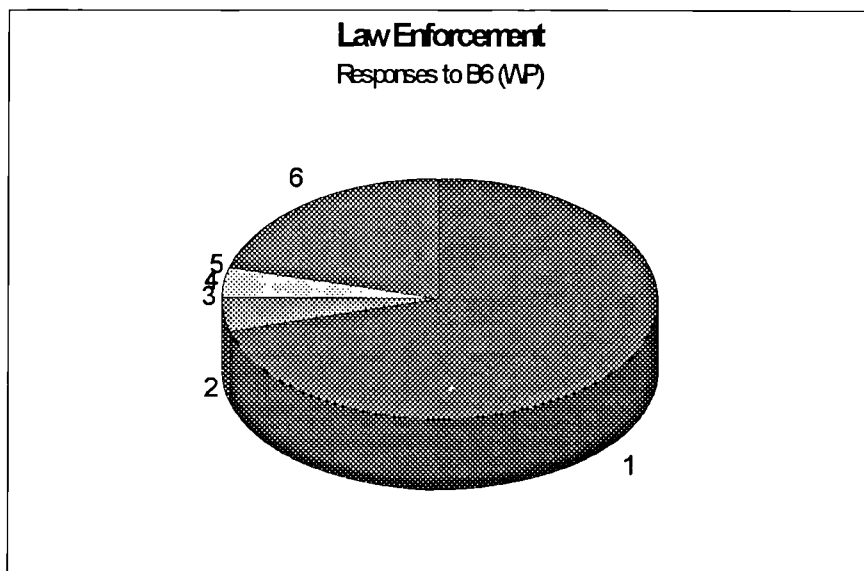
Key to Charts:

<i>Education:</i>	<i>1</i>
<i>Persuasion:</i>	<i>2</i>
<i>Prosecution:</i>	<i>3</i>
<i>Warnings:</i>	<i>4</i>
<i>Notice Serving:</i>	<i>5</i>
<i>Recommending</i>	
<i>Improvements:</i>	<i>6</i>

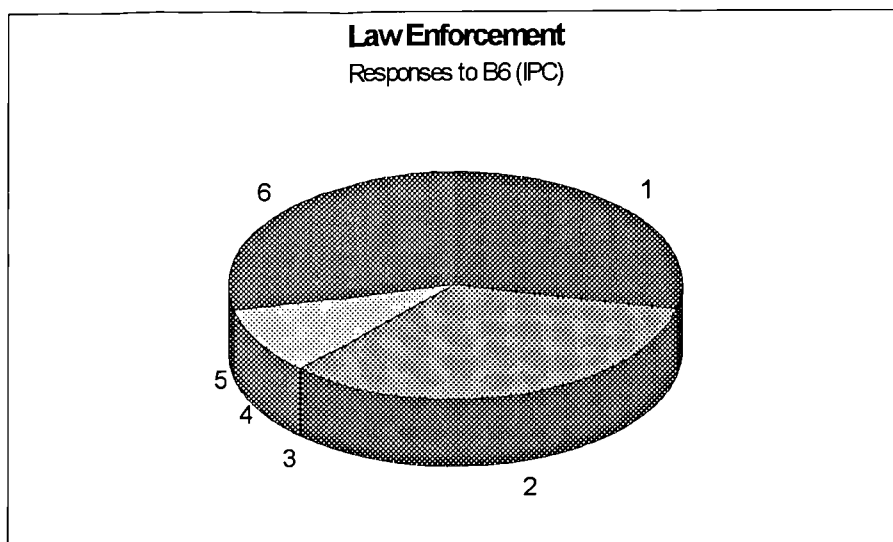
Responses of the Waste Management Sector - *fig 2.5*



Responses of the Water Pollution Sector - *fig 2.6*



Responses of the Process Industries Sector - fig 2.7



2.3.3 Enforcement Style in Post-1996 Process Industries Regulation

The 'process industries' sector of the Agency includes both prescribed processes (IPC) and regulation of radioactive substances. It represents the 'top end' of pollution control as operators tend to be large multinational organisations dealing with extremely hazardous materials. Which mechanisms of enforcement were preferred by respondents and interviewees in this sector of the Agency? The survey results on preferred enforcement mechanisms do not show any greater affiliation for informal enforcement mechanisms than was the case for water pollution respondents. Respondents were almost equally spread across the informal mechanisms of enforcement; **33%** choosing persuasion and **28.5%** choosing both education and recommendation of improvements. **9.5%** of IPC/RAS respondents chose threatening formal enforcement with warnings as their preferred mechanism. The fact that the importance of warnings was rated slightly higher here than by water respondents may be due to the greater impact of a prosecution on large IPC operators,¹⁴¹ or on the smaller control group used for IPC/RAS (only 21 in total). Again, the process industries limb of the Agency is confirmed as compliance-oriented in its stance on enforcement.

¹⁴¹ As to which, see generally, A. Mehta, "IPC Penalties and Deterrents: The View from Industry." (1997) 9(6) *Environmental Law & Management*. 274 and chapter 3.

2.4 Conclusion: An Inheritance of Commonalities

The results of the survey seem to confirm that the regulatory styles of these three sectors is much closer than might at first have been predicted. Their convergence at the compliance-based end of the enforcement style continuum appears from the survey to be perhaps even more pronounced than the historical account suggested.¹⁴² Thus, despite the very different beginnings, statutory aims and powers and personnel of these strands of regulation, it appears that all three share a deep-rooted preference for informal, compliance-based enforcement and view legal action very much as a last resort.¹⁴³

Media comment confirms this conclusion that the Agency has adopted the traditional non-legalistic approach to enforcement. After its first year of regulation, the Agency stood accused of being a '*Toothless Tiger...On The Run*'.¹⁴⁴ Evidence presented to a Select Committee in 1996-97 showed a recurrence of many of the criticisms once aimed at the approach of the Alkali Inspectorate.¹⁴⁵ The Agency was attacked specifically for its regulation of the cement industry;¹⁴⁶ which was characterised by secrecy,¹⁴⁷ non-enforcement¹⁴⁸ and a close relationship with the regulated industry.¹⁴⁹ These criticisms correspond precisely to the allegations of secrecy, announced inspections, policies of non-enforcement and the protection of commercial information which were levelled at the Agency's predecessors.¹⁵⁰ In 1997, *Friends of the Earth* suggested the Agency was; '*weak willed and unable to*

¹⁴² Dr Leinster giving evidence to a select committee representing the Agency stated that the Agency's aim would be, "*a very low level of prosecution...associated with most of industry obeying the law.*" House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484 at 242.

¹⁴³ Of course, this convergence could be in part due to the process of integration of the three sectors of the Agency, a process which had already commenced at the time the survey was conducted.

¹⁴⁴ *The Guardian* 23rd April 1997. These allegations were based on a failure to prosecute anyone over a year after a supertanker ran aground, spilling over 100,000 tonnes of crude oil into the sea. ('The Sea Empress,' which ran aground off the Pembrokeshire Coast.)

¹⁴⁵ A regulatory body created in the 1860s with responsibility for emissions from the chemicals industry. For further detail on this regulator's approach to enforcement see chapter 3.

¹⁴⁶ House of Commons Select Committee on the Environment. *The Environmental Impact of Cement Manufacture*. 1996-97 HC 124; also reported at (1997) *ENDS Rep* 266 March p.30.

¹⁴⁷ Reluctance to disclose non-statutory consultations to the public and the secret grant of an authorisation allowing the cement industry to avoid the cost of landfill levies and increase their input of dioxins into their kilns.

¹⁴⁸ Failure to take formal enforcement action against a large scale waste disposal operation performed without either planning permission or waste management licence (a situation which had persisted for nine years).

¹⁴⁹ The Agency retained HMIP's practice of pre-notification of inspection visits.

¹⁵⁰ Particularly the Alkali Inspectorate and Her Majesty's Inspectorate of Pollution, on which see 2.1.1.

defend the environment from the ravages of big business.'¹⁵¹ In the same year, Michael Meacher, the environment Minister, criticised the Agency for failing to punish offenders properly and directed them to take a tougher line on enforcement.¹⁵² Finally, the Select Committee on Environment, Transport & the Regions¹⁵³ reprimanded the Agency over its prosecution profile:

*"[W]e are not convinced that the threat is a sufficient deterrent to offenders when the rate of prosecution is consistently low...the Agency...needs to reconsider the message which it is sending out to the industry, that it would really rather not prosecute...the Agency must ensure it remains, and is recognised as, the dominant partner."*¹⁵⁴

Certainly, the Agency's enforcement statistics for 1996-97 show a slight decline in prosecutions brought across all three sectors of environmental protection, a fact which may suggest a reduced emphasis on adversarial enforcement.¹⁵⁵

¹⁵¹ Mike Childs, Friends of the Earth, 'Muddied Water from down the Thames.' (1997) *The Guardian* 7th April, 18.

¹⁵² J. Burke, et al "Revealed: The Chemical Giants Polluting Britain." (1997) *The Sunday Times*, June 1st, p.1.

¹⁵³ House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484.

¹⁵⁴ Ibid at para 242-243.

¹⁵⁵ See fig 2.8 which shows a 16% drop in water prosecutions, a 20% reduction in IPC prosecutions and an 11% reduction in waste management prosecutions from the years 1995-96 to 1997-97. This may, however, be due to the devotion of resources to reorganisation and integration which necessarily detracts from other resource intensive activities. The Environment Agency Annual Report & Accounts 1996-97, p.80 shows that £11.7 million was spent on reorganisation and integration.

Fig 2.8¹⁵⁶ ENVIRONMENTAL PROTECTION PROSECUTIONS

<i>Year</i>	<i>Water</i>	<i>Waste</i> ¹⁵⁷	<i>IPC</i>
1994-95	316	400	5
1995-96	282	271	3
1996-97	235	241	8
1997-98	261	290	11
1998-99	270	367	17

So why has the tradition of compliance-oriented informal enforcement persisted? What driving or inhibiting forces are responsible for restraining the use of formal legalistic enforcement? The answer to this question will be sought first by looking at the drivers of enforcement style highlighted in Hawkins' work; the profile of the regulatory population (chapter 3), political ambivalence (chapter 4) and moral ambivalence (chapter 5).

¹⁵⁶ Sources: For 1996-98, the Environment Agency Annual Reports. Prior to 1996, the figures are taken from HMIP Annual Reports, NRA Water Pollution Incidents Reports, and for waste management, 1994-95 - National Association of Waste Regulation Officers report and 1995-96 - the author's own survey, the results of which are reproduced in the Appendices.

¹⁵⁷ In 1995-96, a number of the Waste Regulation Authorities informed the researcher that cases were being held over at the end of their last year for the commencement of the Agency. This 'hold-over' may have had a distorting effect on Environment Agency enforcement statistics in that the statistics may represent a more adversarial approach than is in fact being taken.



Chapter 3

PROFILE OF THE REGULATORY POPULATION AS A DRIVER OF ENFORCEMENT STYLE

"What prompts a sanctioning rather than a compliance response is not who does the law enforcement so much as the sort of behaviour which is subject to control."

(K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.6).



*C*HAPTER 3

*P*ERCEIVED PROFILE OF THE REGULATORY POPULATION AS A DRIVER OF ENFORCEMENT STYLE

*The historical account in chapter 2 of the Agency's predecessors appeared largely consistent with enforcement cultures driving the distinctions in enforcement style. The aim of this chapter is to look more closely at the regulatory sectors of the Agency and, with the aid of officer interviews and surveys, to assess the validity of Hawkins' assertion that enforcement style is determined primarily not by 'who' does the enforcement, but 'the sort of behaviour which is subject to control.'*¹

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¹ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), p.6.

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3.6 Conclusions & Comment

3.1 Introduction

In untangling what has been documented about the three regulatory sectors which make up the Agency's pollution control function,² it appears that in enforcement terms, these regulators shared more common features than has often been assumed. Nevertheless, there does appear to be a distinction in degree between the level of aversion to formal enforcement in the process industries sector (which includes IPC) as compared to the waste and water sectors where prosecution was used more readily. It seems logical to attribute these apparent distinctions to the diverse profiles, histories and legislative mandates of these regulatory bodies. For example, legislative provisions and the ease with which they could be invoked may have been responsible for the NRA's ability to portray itself as a stealthy enforcer. The philosophy of each organisation may also have been important. Both IPC and waste management regimes were operated under an objective of 'prevention first.' The NRA did not have an overriding prevention objective, but operated on the basis of permitting discharges according to the amounts which the water environment could tolerate (the assimilative capacity approach). Additionally, the officers themselves tended to perceive any difference in enforcement style as cultural rather than as a function of any differences in the regulatory population.

² See chapter 2.

Certainly, the evidence presented in chapter 2 which demonstrates the diverse backgrounds of these three regulatory sectors and their diverse enforcement reputations lends testimony to and is consistent with the notion that the identity of the regulator is important in determining enforcement style.

When an attempt was made to look more closely at the influence of 'who' does the enforcement (the identity of the regulator) and the perceived profile of the regulatory population on enforcement style, it was not possible to observe the phenomenon of enforcement in the detail that Hawkins' did, due to the understandable sensitivity of the Agency to outsider scrutiny. Nevertheless, officers and regional managers were generous in their participation in a survey of enforcement attitudes and interviews.³ These communications provided a wealth of data concerning the influences on enforcement style. Survey questions were designed to highlight regulatory identity (for example, what officers felt the primary aim of the Agency to be, what they perceived the function of prosecution to be and the significance of high prosecution rates) and officers' perceptions of their regulatory populations (what was the main cause of non-compliance, how did operators respond when non-compliance was brought to their attention, how would they characterise the operators they dealt with?). By assessing where the main variance was in the answers given by officers from the process industries sector, waste and water sectors it was possible to form some general conclusions regarding the role of regulatory populations and regulatory identity as drivers of enforcement style.

3.2 Drivers of Enforcement Style in the Agency

3.2.1 Drivers of Enforcement Style in the Waste Management Sector

i) Role of Agency and Function of Prosecution

When respondents were asked what they felt the primary aim of the Agency to be, very few identified with the aim associated with sanctioning styles of enforcement; 'punishing those who do not comply with legal requirements.' The survey results confirmed that punishing and sanctioning play a relatively small part in officers' perceptions of the Agency's role across all three pollution control sectors. Of the three sectors, it was, however, waste management respondents who most readily

³ Details of the survey design and methodology and a discussion of the limitations of interviewing are to be found in appendices B and F. See also the detailed breakdown of survey results in Appendix B.

identified with this punitive aim, with **30%** regarding it as one of the three most important aims, as compared with **24%** of water quality respondents and only **5%** of IPC respondents.⁴

The following excerpts from interviews and surveys demonstrate the readiness within this sector to associate with a sanctioning approach to law enforcement:

*"Effective enforcement requires showing 'customers,' or whatever you want to call them, that there is a good chance that they will get caught, and that when caught they will see the results of being caught quickly."*⁵

*"From 38 years of enforcement experience it is my strong belief that, a wrongdoer will ignore legislation if they feel it places them at a disadvantage or they can benefit from it. In general they will comply with legislation if they know the chance of being caught is high...a fair but strict regulator is something which the public and industry understands and appreciates."*⁶

*"Whilst enforcement action by prosecution should not be our first course of action except where flagrant or other circumstances warrant it, with regard to level playing fields etc...we cannot let those who seek benefit over law abiding companies do so with impunity, otherwise the effect will be deterioration."*⁷

Respondents were also questioned as to their perceptions of the function of prosecution in their department, and again it was waste management officers who showed the greatest affiliation with punishment as a function of prosecution. This difference is marginal,⁸ and suggests that the waste management section of the Agency is only slightly more predisposed to perceiving operators as 'criminals' deserving punishment.

⁴ Question B1. Once again, this is consistent with the waste management sector operating the closest to a sanctioning approach to enforcement, as Hawkins identified the sanctioning style of enforcement with the driver of punishment.

⁵ Waste Management Senior Enforcement Manager, October 1997.

⁶ Survey respondent.

⁷ Survey respondent - Waste Management.

⁸ 15% as opposed to 9% in water and IPC). Question B4.

A marginal majority of waste management respondents saw a high prosecution rate as a sign of regulatory failure (34.2%).⁹ Results from water and IPC sectors, however, showed a much stronger preference for prosecution as regulatory failure (42.8% and 50% respectively), another indicator which Hawkins associated with compliance-oriented enforcement.¹⁰ This result tends to confirm the waste management sector as tending further towards the sanctioning end of compliance-oriented enforcement than the other two sectors.

ii) Perceptions of the Regulatory Population: Levels of Resistance and Culpability

How did survey respondents' and interviewees' perception of operators appear to affect their approach to enforcement? The survey asked respondents to rate how responsive operators were when a breach was brought to their attention. The survey indicated that Agency officers generally felt that operators were responsive to their requests for improved compliance. For example, in the waste management sector, 76% of the respondents replied that operators attempted to rectify the breach immediately and only 16.6% replied that operators would fail to rectify the problem until they were given no other option. It was this sector, nevertheless, which scored lowest in terms of perceived responsiveness of operators, as none of the process industries respondents took the view that improvement was delayed until there was no other option.

Kagan distinguished 'police' and 'regulators' with the general observation that regulators are rarely faced with physical resistance or physical attack.¹¹ While this distinction generally holds true in environmental regulation, a further distinction emerged between waste management regulation and other branches of environmental regulation, in that the former appeared more likely to experience physical and/or violent resistance. Waste management officers interviewed, generally had stories to tell about physical threats by operators, sometimes taking the form of witness intimidation outside the courts. An interviewee from waste management spoke of one member of his enforcement team being a 'heavy' who accompanied Agency personnel to sites where the operator was known to resort to violence. Further evidence of abusive regulatees was raised in a waste management hearing attended during the course of the research, in which the defendant had been

⁹ As compared with 28.9% who felt it showed the regulator was powerful.

¹⁰ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), p.5, discussed at 1.1.4.

¹¹ E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981).

caught in the act of burning waste on an industrial estate. On being asked by the officers where the waste had come from, the defendant retorted:

*"Are you telling me I can't chuck my own ****ing waste on my own ****ing fire? - **** off!"¹²*

After further explosive and threatening behaviour, the officers, clearly of the view that 'co-operation' was not an option, retreated to a safe distance, to prepare their notes for prosecution. One waste management interviewee told of his fear of visiting one site in particular where he had anticipated being pushed into a quarry by the operator concerned. This comparatively regular contact with the class of 'rogue' operators which seems largely peculiar to waste regulation has been recognised by the Environment Agency at policy level:

"Those in local waste regulation units have recently been on a course in unarmed combat. This is so they can deal with the illegal end of the waste disposal market safely. By this I mean the scrap metal dealer with two Rottweilers."¹³

Such confrontational behaviour involving personal threats made against enforcement officials may occasionally inhibit the use of prosecution. On the whole, however, it is felt that these operators cannot be reasoned with, and informal enforcement strategies would simply not be effective. Officers expressed the view that the only available option is, therefore, to invoke the coercive approach of immediate notice serving and summons for prosecution.

Further confirmation that the informal mechanisms of education and persuasion were often considered 'inappropriate' for the waste operator came from interviews with officers describing the typical urban waste management operator. For these operators, environmental concern was considered to be a luxury the operator could often ill afford:

"Education is all very well with the Shire Counties. We can't educate those who can't afford not to break the law. Regulation in the Metropolitan areas is through the court."¹⁴

¹² Lancaster Magistrates Court, February 1998.

¹³ 'Pollution Inspectors Prepare for Dirty Fight.' *The Times* (1996), a quote from Ed Gallagher (Chief Executive of the Agency).

¹⁴ Waste Management interviewee, September 1997.

*"Some people are not open to education and quite a number of times an offence is committed purely due to lack of effort or expenditure by the defendant and an attitude of disdain for the environment."*¹⁵

*"There was a case involving tipping taking place over several years. Three quarters of a million square metres of the defendant's land had been filled with degradable waste. The defendant was a major player and was taken to court for two s.16 Control of Pollution Act offences.¹⁶ He was fined £10 for each offence and £10 costs. The WRA did a whole new case. On finding he was to be prosecuted again, the defendant showed the WRA a pile of bills to show he could not pay any fines. He was a major player, he didn't comply with anything, he didn't even have a licence. The court gave him a custodial sentence of three months. (On appeal this was reduced to six weeks.) When he came out he was a changed man."*¹⁷

The informal strategies of education and persuasion play a more significant role in the regulation of licensed sites than with unlicensed operators. It seems, therefore, that the 'twin track' approach to enforcement in waste management¹⁸ has been inherited by the Agency, as it is for unlicensed operators that prosecution is considered a likely option:

"[T]here is a difference in approach required. Unlicensed activities usually require warnings and sometimes immediate prosecution... whereas licensed sites are easier to deal with by pressure or notices, etc."

*"With unlicensed sites the policy has been to prosecute straight away whereas with licensed sites, a more co-operative, persuasive approach is taken."*¹⁹

Survey respondents were also asked which factors or motives dominated non-compliance in their field of regulation; unavoidable accident, incompetence, profit seeking, ignorance of legal requirements, disagreement with legal requirements or a small risk of being prosecuted. Waste management respondents identified most

¹⁵ Survey respondent (WM).

¹⁶ The offence of depositing controlled waste without a licence (the precursor to s.33(1) EPA 1990).

¹⁷ WM interviewee, September 1997.

¹⁸ See 2.1.3.

¹⁹ Waste Management officer, September 1996.

strongly with 'profit seeking' as the main reason for breach (72%),²⁰ whereas only 15% felt that 'incompetence' was the main reason for non-compliance and only 4% felt that non-compliance was usually attributable to an 'unavoidable accident.' The prominence of profit-seeking motives in this sector may be a direct result of the substantial costs of legal disposal which can include; waste management licence fees, carrier registration fees, the costs of compliance with the licence/registration conditions, landfill levies and fees charged by waste management companies for safe legal disposal by incineration, treatment or landfill.

The prominence of deliberate/profit motivated offending was again supported by waste management interviews. These officers dealt with a significant element of deliberate offending by operators seeking to evade Agency detection, and for the most part succeeding:

"The Agency does not employ enough enforcement officers to deal with the fly-tipping and environmental crime currently going on in the North East. We cannot be pro-active as the budget will not allow surveillance outside hours - many criminals are simply getting off, after all, they know we only work Monday to Friday - the one thing they do know about us!"²¹

"Effective regulation by the WRAs was poor and mainly ineffective. Add to this, unwieldy legislation, an under-funded, under-resourced, de-motivated regulatory body (the Environment Agency) then the current situation of large scale environmental crime and non-compliance with legislation is hardly surprising. To rectify this situation which has been allowed to grow to its current level, strong medicine is now frankly unavoidable and necessary."²²

"Fines are often tiny compared to the money being made by these offences."²³

"The waste industry is a fast moving, large industry. Many companies and individuals are only interested in profit to the virtual exclusion of everything else including the regulatory body and associated legislative framework."²⁴

²⁰ Question B2.

²¹ Survey respondent, waste management (emphasis added).

²² Survey respondent, waste management (emphasis added).

²³ Waste Management officer, June 1997 (emphasis added).

²⁴ Survey respondent (WM) (emphasis added). This emphasis of 'offending for profit' was borne out by the author's observations of Agency prosecutions. Waste management prosecutions were the only

These officers' identification of profit-seeking as the major reason for offending is likely to be a source of the greater affiliation for formal enforcement in the waste management sector.²⁵ A significant number of operators in this sector are perceived as 'amoral calculators,' and the regulatory response to such operators is, according to Kagan and Scholz, to adopt the manner of a policeman,²⁶ focusing on deterrence and punitive strategies of enforcement.

The proportion of such unlicensed 'rogue' offenders encountered in waste management who represent a real criminal element seems to be accepted as an inevitable part of regulation. The flytipper who is caught cannot be supervised as to his future conduct, and the only available enforcement mechanism in his case is prosecution. The frequency with which waste is disposed of illegally and deliberately, means that if prosecution (the only available sanction in many cases) was viewed as a failure to 'prevent' or to 'communicate the need for compliance,' the morale of the regulator would inevitably suffer. This offers an explanation for the fact that waste management respondents associated least strongly with the proposition that a high prosecution rate indicated regulatory failure.

3.2.2 Drivers of Enforcement Style in the Process Industries Sector

i) The Role of the Agency and the Functions of Prosecution

The primary aim of the Agency was overwhelmingly asserted by respondents as a whole as the 'prevention of environmental damage' (IPC: **47.6%**; WP: **42.3%** and WM. **39.4%**). The process industries sector's strong affiliation with the aim of prevention is likely to be attributable to its long-standing operation under the primary objective of pollution prevention.²⁷ This clear identification with the driver of pollution 'prevention,' once again supports Hawkins'²⁸ correlation of preventative aims with the compliance style of enforcement, as it is this sector which has traditionally been associated with exercising the greatest degree of compliance-based enforcement strategy.²⁹ Indeed, these officers tended to be of the view that

cases where the prosecutor referred to profit-seeking; for example, one defendant had arranged payment of £40 per week for permitting another company to tip on his land.

²⁵ As concluded in 2.1.3.

²⁶ R. Kagan & T. Scholz, "The Criminology of the Corporation and Regulatory Enforcement Strategies." in K. Hawkins, et al, *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.67-96, pp.69-74.

²⁷ See 2.1.1. and 2.3.3.

²⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), at p.4 and Chapter 1 at p.14.

²⁹ See 2.1.1 and 2.3.3.

prosecution was incompatible with the preventative aim, as resources devoted to legal action would not be available for preventive activities, such as increased inspection frequency. A well targeted inspection had far greater capacity to 'prevent' pollution than a prosecution.³⁰

It was also process industries officers who subscribed most strongly to the view of prosecution as 'regulatory failure' (43.9%), another of Hawkins' indicators of compliance styles of enforcement.³¹ These officers thought that a high number of prosecutions indicated '*poor communications or regulation by the enforcing body*' and saw prosecution as evidence that the regulator had failed in its primary objective of harm prevention:³²

*"I would like to emphasise that a key philosophy of IPC is prevention and minimisation of pollution. Detailed site inspections are carried out and a lot of time is spent in discussion with operators in order to prevent environmental harm....This approach is not apparent in other operational teams in the Agency. I am not at all against taking prosecution where it is warranted, but if I had been visiting the site for two or three years, I would be disappointed that I was not able to 'prevent.' "*³³

Similarly, it was a process industries inspector that was quoted in the press as saying:

*"You can't stick a cork in a chimney. Prosecution after the event is not a way of stopping it. We prefer to protect and improve the environment rather than to punish. "*³⁴

The emphasis on prevention may, therefore, be responsible in part for a greater reluctance to prosecute in this sector:

*"For [the process industries sector] to take a prosecution it would have to be something fairly serious. We are perhaps less likely to be swayed by public opinion. "*³⁵

The belief of process industries Inspectors that 'prevention' is attainable in the majority of cases possibly minimises the importance of 'punishment' in their thinking. One inspector talking about prosecution demonstrated that he distanced his

³⁰ IPC Survey Respondent and comment from IPC interviewee, June 1998.

³¹ Question B3.

³² Survey respondent IPC.

³³ Survey respondent from IPC.

³⁴ J. Burke, et al "Revealed: The Chemical Giants Polluting Britain." (1997) *The Sunday Times*, June 1st, p.1.

³⁵ IPC Interviewee, May 1998.

work from the sanctioning process of prosecution by handing over unco-operative operators to the courts:³⁶

*"The Agency are not concerned with punishment. Prosecution is considered to be the 'offering' of the defendant to the courts for punishment. Offering for punishment is an option only taken when enforcement has failed. Prosecution is not viewed as an enforcement mechanism, but the threat of prosecution is."*³⁷

If these inspectors believe that prosecution is rarely necessary to induce compliance, is this because their confidence in the threat of enforcement is such that the threat alone is considered to be sufficient in magnitude to induce compliance? The judicial penalty is not the only, or sometimes even the main, reason an operator may want to avoid prosecution. As consensus builds on the undesirability of environmental harm, extra legal sanctions such as adverse publicity, impact on consumer loyalty and forfeiture of environmental management systems' accreditation may also be prompted by a well-publicised court case.³⁸ These factors augment the threat of prosecution, and it is process industries operators who seem most vulnerable to these forms of sanctioning. This is supported by the fact that it was process industries inspectors who favoured adverse publicity as the most important aspect of the prosecution process (47.5%).³⁹

In the process industries sector, where the greatest degree of persuasion and informal means of inducing compliance is traditionally considered to exist,⁴⁰ a number of interviewees tended to view the Agency not as a coercive force, but as a facilitator of compliance:

"We might say to an operator, 'if you do this by the end of the year I won't serve a variation or enforcement notice on you.' This gives them time to plan the timetable of improvement and they can get tenders in, it is a lot less costly for them to do it this way than to be

³⁶ Question B4. Cf. J. Fionda, *Public Prosecutors and Discretion: A Comparative Study*. (Clarendon Press, Oxford, 1995) where the decision to prosecute is described as an act of sentencing and therefore a determination to punish in itself.

³⁷ IPC Interviewee, September 1997.

³⁸ Again, as a general conclusion, this observation is far from unprecedented. In 1979, Feeley stated; *"In essence the process itself is the punishment. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence."* M. Feeley, *The Process is the Punishment*. (Russell Sage Foundation, London, 1979). An assessment of the current moral status of environmental offending is given in chapter 5.

³⁹ Question B3.

⁴⁰ See 2.1.1.

served with a notice and have to make the improvements in six weeks."⁴¹

*"We conduct a balancing act with large plants. We allow smaller things to go on if they clear up the bigger things."*⁴²

Consistently with this view of regulation as facilitation rather than coercion, the 'meeting of equals' which characterised HMIP and Alkali Inspectorate enforcement,⁴³ was clearly still a strong theme in process industries regulation:

*'There is no substitute for common sense, experience and the ability to communicate on an even 'playing field' with operators, i.e. 'peers'.'*⁴⁴

This results in a general emphasis on co-operation and the belief that operator and regulatory objectives are not so far apart. Confirming this conclusion, one officer commented that sometimes, the initiative for plant improvement came from industry itself and the Agency acted merely as a catalyst:

*"Some managers may want to see the environment around their plant improve, but they can't say anything to the Board because there is no pay back. So we ratchet up this feeling with threats. Some processes are so complicated, it is the operators rather than ourselves who suggest a means for improvement. The manager may suggest an area for improvement but say he hasn't got the funds, so I'll say well I can write to the Board and tell them they have to make this improvement, and the money is made available. We just need to convince them of the need."*⁴⁵

Whilst the regulatory relationship in process industries may be less coercive, the burden of regulation is still extremely weighty. In fact, the processes in this sector are often so complex that the Agency is not in a position to drive improvements or to educate. Sole responsibility for meeting legal standards falls, therefore, upon the operator. The prosecution of a multi-national company prompted comment by the Agency's barrister on the role of the Agency in process industries regulation:

"The Agency do not go to the extent of making specific requirements because, in theory, the defendant could say, 'well that's all you

⁴¹ IPC Interviewee, June 1998.

⁴² Ibid.

⁴³ See 2.1.1.

⁴⁴ Survey respondent IPC.

⁴⁵ IPC Interviewee, June 1998.

required us to do.' It is not physically possible to visit all sites and tell them what to do."⁴⁶

"The Agency can make recommendations but its ability to make requirements is very limited. We leave it to the operator. If the defendant had an adequate system of warning, bunding would not necessarily be a priority - we leave it to the defendant to choose a way of managing the risk."⁴⁷

These comments reveal a far more flexible approach under the process industries regime, whereby the scope for improvement may be highlighted by the Agency, but the discretion as to the chosen means of improvement has been *delegated* to the regulatee. This is the direct result of the 'Best Available Technology Not Entailing Excessive Cost' concept which is so central to process industries regulation.⁴⁸ The above statement also acknowledges a belief that effective regulation is perhaps not possible given the inequality of power between large corporate bodies and the Agency. Within this context of inequality, co-operation perhaps offers the best available means of securing compliance.

⁴⁶ Agency counsel at court hearing, March 1998.

⁴⁷ Ibid.

⁴⁸ The basis of control in this arm of regulation has always been the concept of best practicable means (BPM); the reality of pollution control requiring a balance to be struck between the costs and benefits of pollution abatement for industry and for society (Royal Commission on Environmental Protection (1976) *Air Pollution Control: An Integrated Approach*. Cmnd 6371). The discretion afforded by BPM meant the provision was unenforceable through the courts. Indeed, as recently as 1991 it was observed that in nearly 50% of cases the notes detailing the BPM for a given process were missing or incomplete National Audit Office (1991). *Control and Monitoring of Pollution: Review of Pollution Inspectorate* HC 637 90-91 vol.XXXVIII, p.17). Therefore the BPM concept was never given judicial definition, but the element of 'practicability' was considered to require reference to the local conditions, circumstances of the plant, the state of technology, the costs of abatement to the operator and of non-abatement to the environment (A. Jordan, "Integrated Pollution Control and the Evolving Style and Structure of Environmental Regulation." (1993) *Environmental Politics*. 2(3) 405, at p.408 and at T. O'Riordan, "Industrial Pollution Control in the UK." (1993) 129 *Science of the Total Environment*. 39, p.40). BPM came to be replaced by the European concept of Best Available Technology Not Entailing Excessive Cost (BATNEEC). The shift from requiring industry to engage best '*practicable*' means of pollution abatement, to utilising the best '*available*' means '*not excessive in cost*' is uncertain in scope. Does the point at which a technique is deemed not '*practicable*,' mean that it must also be excessive in cost? The courts have not been invited to comment. What is certain is that BPM or BATNEEC, the concept affords significant room for negotiation by inspectors as to the standards of pollution control which are acceptable from specific plants. It is now an implied condition in all IPC authorisations that the BATNEEC is utilised to prevent the escape of prescribed substances, and to render these substances harmless (See s.7(4) EPA 1990). The Integrated Pollution Prevention and Control directive (96/61, OJ No.L 257) makes a further substitution of the BATNEEC standard with emission limits based on the Best Available Technology (BAT) (Ibid at Article 9).

ii) Perceptions of the Regulatory Population: Levels of Resistance and Culpability

How did the prescribed processes respondents' and interviewees' perception of operators (in terms of levels of resistance/responsiveness encountered and prominent motives/reasons for offending) appear to affect their approach to enforcement? Again, respondents from this sector recorded operators as most likely to rectify a breach as soon as it was pointed out to them (95%) and none of these respondents felt that obstruction or failure to rectify was the norm. The perceived level of responsiveness amongst operators seems then to be significantly higher than in the waste management sector.⁴⁹

In contrast to waste management, the conduct of unlicensed activities is a rare occurrence in the process industries sector. Most officers doubted that there were many process industries which remained unauthorised. This can be contrasted with waste management where the majority of prosecutions are for unlicensed activities.⁵⁰ Prescribed processes inspectors, therefore, have very few dealings with deliberate offenders/rogue operators who seek to stay outside the regulatory system altogether. Indeed, process industries inspectors identified deliberate incidents as very rare, whilst admitting that in the context of self-monitoring, where the Agency is heavily dependent on industry for information concerning compliance, it would be exceedingly difficult to identify acts of deliberate pollution on an authorised site.

Again, in contrast with waste management interviewees, prescribed processes interviewees consistently denied ever having confronted physical resistance in the course of their duties. That is not to say that resistance was never encountered, but that process industries operators engaged institutionalised forms of resistance:

*"...rather than the threat of a shotgun or a lock out, they make equally ferocious threats of judicial review or legal challenges. These are very significant to the Agency."*⁵¹

⁴⁹ Where 76% of officers believed that operators were most likely to rectify a breach as soon as it was brought to their attention.

⁵⁰ Agency officer, August 1998.

⁵¹ RSR interviewee, June 1998. This point identifying wealthier operators as being more prepared to contest prosecutions and maximise the costs employed in a court case is confirmed in the context of Agency prosecutions at Chapter 5. See also R. Cranston, *Regulating Business - Law and Consumer Agencies*. (Macmillan, Social Science Research Council, London, 1979) at p.125, and specifically in relation to challenge of Agency enforcement see the damaging case of *Environment Agency v Petrus Oils*, discussed at (1998) *ENDS Rep* No. 286, p.18, where the Crown Court dismissed the prosecution as being 'unfair and oppressive.'

As has already been seen, officers in waste management anticipated that operators would often be evasive and unco-operative, just as Hawkins in 1983 concluded that it was perceived by the Water Authorities as 'normal' for dischargers to 'try it on,' or 'pull a fast one.'⁵² The expectations in the process industries sector are, however, quite different:

*"RAS [radioactive substances] nuclear work is all with professionals with vast amounts of experience who talk at a detailed technical level. From Sellafield I expect a high degree of professionalism and experience, and, by and large, I know they are not out to con me or to break the law. It is alien to nuclear sites to break the law."*⁵³

The general conclusion that large process industries operators are perceived as honest and co-operative was confirmed by interviewees' comments about self-reporting. In 1990, HMIP determined that responsibility for demonstrating compliance with numerical limits of an authorisation was to rest on operators themselves.⁵⁴ This self-monitoring arrangement means that this sector is heavily reliant on the operator for information concerning its own deviations. Self-reporting is, of course, open to the criticism that contemporary monitoring devices are not tamper-proof, and could be readjusted for the purposes of the 'announced' visits of the process industries inspectors.⁵⁵ Interviewees from this sector tended, however, to doubt that tampering was a large scale problem given the nature of the operators they regulated:

*"There is a very small possibility that releases are covered up - and I have known of one of two occasions where that has happened. The majority of companies are, however, complying with the law and the spirit of that law. You have got to remember we are dealing with large companies and these are responsible companies, and despite what people may want to think, they care deeply about environmental performance."*⁵⁶

"They know that if they were to conceal breach of their limits the Agency would come down on them. They know reporting the breach is the lesser of the two evils. Also, it is not really possible for them to cover it up. Most of the time these self-monitoring samples are sent

⁵² K. Hawkins, "Bargain and Bluff." (1983) *Law & Policy Quarterly*. 35, at p.44.

⁵³ RSR interviewee, June 1998. Compare this view with the reports in 1998 of multiple breaches in the nuclear sector. See "The Experiment Ends But Dounreay Lives On." (1998) *The Independent*, June 6th, p.12.

⁵⁴ G. Lyons, *A Review of Part I of the Environmental Protection Act and its Implementation*. (World Wide Fund for Nature, London, 1992), at p.41.

⁵⁵ Ibid at p.43.

⁵⁶ IPC Inspector, November 1998.

*off to laboratories for testing. These 'lab' results go past a lot of people...in management. There would be a lot of people who would know if limits were exceeded and there are a lot of people who have a strong environmental conscience."*⁵⁷

This apparently high level of trust between regulator and regulated may also be the reason behind the much criticised practice in this sector of 'announced inspections.' The Alkali Inspectorate was permitted to enter and inspect works at all reasonable times of night and day *without previous notice*.⁵⁸ An independent report into the activities of the Alkali Inspectorate in 1974⁵⁹ noted that polluters could easily evade the Inspectorate by discharging unauthorised noxious substances during the night shift, as visits were always made during office hours. Even after this was brought to the attention of the Inspectorate, no change was made to existing practices of day-only inspections. The complaint was also made⁶⁰ that operators were generally notified in advance of inspection visits. A practical justification has however been offered for the continued practice of announced inspections. The legislation regulated the processes being operated at a given site, rather than focusing on 'end of pipe' matters such as emissions and discharges from the site.⁶¹ A staff escort would therefore be needed. Announced inspections also ensured that a site manager was available and that the often long journey to the site for the inspector was not a wasted one:

*"I wouldn't go round a nuclear site unannounced because it puts the operator in a bad position. This is a consideration with all sites. They are responsible for the safety of visitors and they can't ensure your safety unless they know where you are, so there are good practical reasons for announcing your visit."*⁶²

Inspectors recounted 'creeping up' on operators unannounced in exceptional cases and found the results 'interesting.' It was more common, however, to change the inspection schedule once the inspector had arrived on a pre-arranged visit, by requesting to view plant which had not been scheduled for inspection, as this avoided putting site management in breach of their health and safety obligations. This tactic reveals that the initial presumption in prescribed processes, that operators can be trusted, is not absolute. The potential for abuse is recognised, and

⁵⁷ IPC Inspector, November 1998.

⁵⁸ S.9 Alkali Act 1863. Visits are now governed by s.108 EA 1995 allowing inspections by the Environment Agency 'at any reasonable time.'

⁵⁹ M. Frankel, *Social Audit - A Special Report: The Alkali Inspectorate*. (Social Audit Ltd, London, 1974).

⁶⁰ Ibid.

⁶¹ As mentioned in chapter 2.

⁶² IPC/RSR Inspector, July 1998.

means of supervising the operators' trustworthiness are utilised without unduly jeopardising the position of trust.

The mechanism of prosecution in environmental regulation has traditionally been reserved for cases of clear 'culpability' on the part of the operator.⁶³ As the process industries sector appears to employ the lowest level of prosecution, is this because they rarely associate violations with 'fault' on the part of the operator? When asked what they felt the primary motive or reason for offences in their sphere of regulation was, process industries respondents isolated the primary cause of non-compliance as 'incompetence' (62%). Only 5% of process industries inspectors chose the pursuit of profit as the primary reason, whereas, surprisingly, 33% of these inspectors felt that most offences were attributable to an 'unavoidable accident.' This last figure is remarkable as these are the operators whose resources suggest they can afford investments to combat very small risks. For large companies, the employment of specific persons to oversee environmental compliance is expected, but creates a dilemma. Whilst seen by the courts and public to be devoting significant resources to environmental protection, this company should surely be unable to plead in mitigation to the court that the incident was an 'accident', or to plead ignorance as to the content of legislation or various risks presented by the site. Almost every breach is potentially an instance of carelessness, neglect and culpability, as it can be attributed to a failure on the part of the compliance department to effectively manage a risk. This double-edged sword was illustrated in a Crown Court prosecution of *ICI*, where Judge Hale noted the extensive resources of the company and went on to state that the law required far reaching risk assessment.⁶⁴ Outside the process industries regime, it seems that operators are often presumed ignorant of the risk unless the regulator has first identified the risk and brought it to the attention of the operator (i.e. the onus of risk assessment is shared with the Agency).⁶⁵ Process industries are not afforded the same assumption. While the Agency does make periodic inspection visits, and can advise the operator, it seems risk assessment falls more squarely on the shoulders of the operator. The judge in a recent prosecution of *ICI* initially questioned the foreseeability of a risk which had not been dealt with by the authorisations issued by the Agency to the defendant. He concluded, however, that *ICI* **had** neglected a

⁶³ See chapter 1.

⁶⁴ His Honour Judge Hale in 'Environment Agency v ICI Chemicals & Polymers' (1998) March 12th Warrington Crown Court, *ENDS Rep* 278 March 1998, p.47. See also P. De Prez, Environment Agency v ICI Chemicals & Polymers (1998) *Environmental Law & Management* 10(4), pp.187-189.

⁶⁵ See particularly *Hughes v Dwr Cymru* (1996) *Water Law* p.40.

foreseeable risk, and commented: *"risk management is primarily for ICI, but if good practice required bunding, that is the role of the inspector."*⁶⁶

So while deliberate offending is not associated with this sector, when something goes wrong on the site and a prosecution is taken, it is difficult for operators to avoid the implication of being at fault.⁶⁷ This adds weight to the view held by officers that large operators are more vulnerable to legal action and will consequently be responsive to threats and negotiation.

3.2.3 Drivers of Water Pollution Control Enforcement in the Environment Agency

i) Role of the Agency and Function of Prosecution

In accepting the benefits of co-operative regulation, water pollution control interviewees were generally eager to point out the limitations of prosecutions:

*"I don't believe in prosecution for the sake of it. Prosecution is a failure on everyone's part - it means we have not got our message across."*⁶⁸

*"If when you get there they hold up their hands and say, 'what do you want us to do?,' it's no good going in and jumping up and down."*⁶⁹

One officer explained that prosecution was generally reserved for some punishable culpable conduct so that it could fulfil a deterrent function, because the criminal proceedings did not otherwise advance environmental protection:

*"We don't usually prosecute where the offence is committed merely out of ignorance. Where there is definite negligence or they are clearly rogues, they will be prosecuted."*⁷⁰

⁶⁶See P. De Prez, 'Environment Agency v ICI Chemicals & Polymers' (1998) *Environmental Law & Management* 10(4), pp.187-189.

⁶⁷ See Y. Brittan, *The Impact of Water Pollution Control on Industry - A Case Study of Fifty Dischargers*. (ESRC Centre for Socio-Legal Studies, Oxford, 1984) at p.69 where the observation is made that nationalised industries felt that they received a lower level of tolerance for non-compliance with water pollution regulation.

⁶⁸ Water Quality interviewee, November 1997.

⁶⁹ Conversation with Pollution Control Officer in courtroom, August 1997.

⁷⁰ Water Quality interviewee, December 1997.

"Prosecution is a last resort. The fine goes to the Government. If it went into an environmental pot, then I would be more willing to use prosecution. If the defendant is not negligent then I would rather the polluter use the money for putting the pollution right rather than pay a fine to Government."⁷¹

If criminal penalties were used to somehow fund the Agency (rather than recoup its costs) or benefit the environment, he would have felt differently. This officer's account is consistent with the view that strict liability offences are not intended by Parliament to be used in no-fault cases, but that their purpose is to ease the prosecutor's burden of proof in an area of regulation where evidence of fault is difficult to establish.

ii) Perceptions of the Regulatory Population: Levels of Resistance and Culpability

How did respondents' and interviewees' perception of operators (in terms of levels of resistance/responsiveness encountered and prominent motives/reasons for offending) appear to affect their approach to enforcement? Respondents from this sector generally agreed that operators normally responded immediately to a breach which had been brought to their attention (81%). Only 15% felt that continued non-compliance was the usual response. This result reveals only marginally less resistance than was perceived by waste management respondents.

Only 12% of water pollution respondents identified profit-seeking as the primary motive behind non-compliance. Interviewees involved in water pollution control reported encountering pollution with the explicit purpose of profit very rarely, if ever. One officer with over 20 years experience had only come across one such case in the past, and was currently investigating another complaint against a farmer who had allegedly received payment for releasing drums of liquid into a watercourse which ran through his land.⁷²

Whilst waste management officers dealt regularly with confrontational incidents, for officers in water pollution control, it seems that confrontation was relatively rare. Only one water pollution officer interviewed referred to aggressive behaviour:

⁷¹Water Quality interviewee.

⁷² Interviewee March 1998.

*"Farmers can be quite rude. Usually their offences are committed out of ignorance. Some of them exhibit threatening behaviour - some have said; 'You're lucky I don't have my gun with me.'"*⁷³

This may be due in part to the greater territorial implications of farm visits, where the Agency officer has not only entered the regulatee's business premises, but also his home. The general conclusion was, however, that confrontation in the water quality sector was extremely rare:

*"First time contacts are rarely ever aggressive but it does happen from time to time. The general reaction is a guarded, cautionary approach to us. Once we explain what we're about we usually have a good relationship. I have been on the district so long that no-one is seeing me for the first time - I'm like the local bobby round here - that attitude all helps."*⁷⁴

The encouragement of a co-operative relationship between 'equals' was thought by many water pollution control officers to reduce the need for a coercive style of regulation:

*"Once you establish that relationship, companies are more ready to contact you if a problem arises. It all contributes to effective regulation."*⁷⁵

In contrast with the process industries sector, this sector adopts a policy of generally unannounced site inspections. This does not, however, necessarily lend support to the water pollution sector as being less trusting of its regulatory population. The justification is again to be found in the discharge orientation of water pollution regulation.⁷⁶ Where the site already possessed a discharge consent, the field officer would not generally announce his visit. Visits did not normally require a meeting with managerial staff, the officer would simply arrive, take a routine sample and leave.⁷⁷ Most sites were visited at least monthly, and sometimes weekly or daily for large industrial premises.⁷⁸ Similarly, in water pollution regulation under the Agency, inspections are generally unannounced, as no access is needed to the site. The absence of prior notification surely increases the likelihood

⁷³ Water Quality Interviewee, December 1997.

⁷⁴ Water quality interviewee, March 1998.

⁷⁵ Water quality interviewee, March 1998.

⁷⁶ See earlier at 2.2.1.

⁷⁷ Water Quality officer, December 1997.

⁷⁸ Hansard 1989-90, vol. 165, p27, HC 2nd reading of the Environmental Protection Bill 1990.

of a violation being identified and may, in part, be responsible for the prosecution profile of this sector (see fig 2.3).

The number of water pollution prosecutions brought by the Agency has, however, dropped to pre-NRA levels.⁷⁹ This is in line with Bowman's⁸⁰ prediction that once the relatively aggressive approach to enforcement by the NRA had made an impact on industry, water pollution prosecutions would decline. Indeed, the Environment Agency jubilantly reported in 1997 that, for the first time in eight years, the number of reported water pollution incidents had fallen by **10%** on the previous year.⁸¹ However, this is not an improvement on 1991-92 figures. Any signs of the Agency struggling to compete with the NRA's legal enforcement record, may be due in part to shortages in legal staffing. While the NRA brought its own legal department to the Agency, waste and IPC brought few lawyers to the Agency and appeared to rely heavily on the old NRA legal team who undoubtedly found it difficult to deal with such an inflated caseload (see fig 3.1). Rather than increasing its staff resources, by 1998 the Agency reduced its 9,000 staff to 8,500.

Fig 3.1⁸²

Constitution of Regional Legal Departments (7 out of 9 offices)	
Source	Number
NRA*	39
Waste	9.5
IPC	3
Other	2
New Recruits	16
Total	68.5

The scope of water pollution regulation has traditionally involved dealing with a vast range of operators, from the small traders and farmers, to local authorities and large multinational companies. Officers have undoubtedly become skilled at

⁷⁹See fig 2.3 and the breakdown of prosecution rates detailed at 12.1 in Appendix A.

⁸⁰J. C. Bowman, "Improving the Quality of our Water: The Role of Regulation by the NRA." (1992)

⁷⁰ *Public Administration*. 565, at p.573.

⁸¹ The Environment Agency. *Water Pollution Incidents 1997*. 1998.

⁸² For regional breakdown of legal departments see Appendix A.

adapting their approach to these diverse types of polluter. It is this sector which seems to confront the greatest variation in operator attitudes. This would explain the greater diversity in response to the survey questions by water pollution control officers and the lack of many remarkable survey results for this sector.

3.3 Explaining the Diversity of Enforcement Styles

From the evidence presented, it is clear that all three of these regulatory sectors exhibit heavy reliance on the compliance-based style of enforcement and a relative aversion to formal enforcement. Hawkins' assertion that law is only used as a 'last resort' remains convincing when applied 20 years later to the much changed face of environmental regulation. It may have been predicted that the distinctions in maturity, personnel and political context of these three different regulators would have produced very different ideals. Yet, far from being diverse, there seems to be a high degree of convergence of views on enforcement between the sectors, for example, on the prevention of environmental damage as the primary aim of the Agency, on their avoidance of punishment as a function of prosecution and on high prosecution rates being perceived as a sign of regulatory failure.⁸³

There was, however, some small but recognisable variation in the degree of compliance based enforcement strategy practised in each sector. The process industries sector appears to exhibit the strongest loyalty to the compliance-based model of enforcement and the waste management sector demonstrated the strongest tendencies towards a 'sanctioning' approach. The diversity in regulatory populations appears to be an important factor, but certainly not the sole reason for the variance in styles of enforcement which exist within the Agency. From the data discussed above, what variables appear to be prominent in their ability to explain the differences in enforcement style between the sectors of waste, water and process industries?

3.3.1 Age & Experience of Enforcement Personnel

It has been suggested that the likelihood of formal legalistic enforcement can be attributed to the relative age and experience of the individual officer.⁸⁴ In particular, the recruitment criteria for process industries inspectors means that they come to enforcement generally at least ten to fifteen years later than their counterparts in the

⁸³ See Appendix D for a direct comparison of Agency officers' responses across the sectors of regulation.

⁸⁴ Suggestion made during correspondence with Dr Alex Mehta.

other sectors of pollution control, and their industrial background means they are far more able to empathise with the problems experienced by operators. In contrast, recruits to waste and water have largely been graduates, fresh from University with no experience of industry. Consequently, it might be argued that the approach to enforcement adopted by the new recruits, is likely to be more adversarial, as they will not have the same standing in the eyes of operators to be able to negotiate compliance successfully. They may also tend to be less lenient because they lack an insider's appreciation of the difficulties industry faces.⁸⁵

The survey population did contain a small sample of 'new inspectors' whose experience of environmental regulation amounted to less than three years. The survey results in fact contradict the suggested distinction in preferred enforcement style between 'new' and 'old' inspectors. Of the fifteen 'new' inspectors, **53.3%** (37.6%) preferred education as a means of achieving compliance, **20%** (28.2%) preferred persuasion, **6.6%** (0%) preferred the use of notice serving, whilst none (3.5%) favoured the use of prosecution.⁸⁶ (The figures in brackets denote the results for 'old' inspectors).

3.3.2 Ease of Prosecution - Strict Liability

The legislation regulating water pollution creates offences which require no proof of fault or neglect by the operator.⁸⁷ Does this lack of concern with 'fault' in the legislation itself produce a greater readiness in this sector to prosecute which would explain the more aggressive reputation of the NRA? Surprisingly, interviewees from this sector pointed out that there was usually some element of culpability in prosecuted cases. This does not explain a minority of water pollution cases which are prosecuted where the defendant had not been ostensibly careless. But when interviewees were asked about such cases, their first response was invariably that a finding of fault was not a precondition to prosecution, but they tended then to digress by pinpointing some element of culpability:

"There was nothing they could have done to prevent the accident except make the gauge shorter so it wouldn't have been wrenched off by the wind. But hindsight is a very good thing. They were unlucky and they will use the weather conditions in mitigation. They will be

⁸⁵ Ibid.

⁸⁶ See Appendix B at the end of fig 13.6 for a table of results for 'new' and 'old' inspectors.

⁸⁷ The offences under section 85 of the Water Resources Act 1991 require no knowledge of carelessness by the defendant.

prosecuted because of their previous incidents. They have also said they think a vandal may have been responsible, but there is no evidence of this. There are however two big holes in their back fence, so they are still negligent for not keeping proper control of their site."⁸⁸

Despite the highly distinctive nature of the strict liability water pollution offences, it seems this is not foremost in an officer's mind when she/he is deciding whether or not to prosecute. The prosecution must serve a purpose and it is only generally considered likely to do so when there is a culpable form of behaviour in need of correction.⁸⁹ Officers seemed to associate culpability as much with the cause of the incident as with how effectively and quickly the company dealt with the aftermath of the incident. One officer felt that this issue was crucial to the Agency's assessment of the defendant's culpability:

*"Our advice to industry is to be open and honest and we will take that into consideration. Lack of openness seems to affect the minds of Magistrates even more than the Agency. A consented discharge case from a chemical plant was prosecuted when the discharge was ten times that permitted by the parameters of the consent, which technically is illegal. The chairman of the bench of Magistrates gave the Managing Director a dressing down like I've never seen. It was like he asked him to bend over for the cane...he made him look like a naughty schoolboy."*⁹⁰

It seems then, that the strict liability nature of water pollution offences does not fully explain any increased readiness to prosecute in this sector, as the tendency is not to take court action against an operator where there is no suggestion of fault. Whilst the law certainly does not insist on 'fault' for liability,⁹¹ (except for waste management offences) in 24 out of 25 Agency prosecutions observed,⁹² the Agency prosecutor routinely made allegations of some culpable failure on the defendant's part; for example, *a failure to have a system of supervising their pumping*

⁸⁸ Water quality interviewee, March 1998.

⁸⁹ This is in line with the conclusions of W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396, at pp.403-404, and K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) at pp.61-3 (See chapter 1). Prosecution is, however, sometimes viewed as serving in purpose in terms of a show of regulatory strength, in order to promote general deterrence or assuage public concern; see chapter 4.

⁹⁰ Water Quality interviewee, March 1998.

⁹¹ *CPC(UK) v NRA* [1995] Env LR 131 CA.

⁹² See chapters 5 & appendix F.

operations,⁹³ failure to identify substances in the drums as containing iodine,⁹⁴ failure to ensure pipework running across their land was secure,⁹⁵ failure to make themselves familiar with their own pipework,⁹⁶ failure to install overflow alarms,⁹⁷ failure to take action to prevent downstream flow of pollution,⁹⁸ delay in reporting a pollution incident to the Agency⁹⁹ and evidence of previous pollution.¹⁰⁰ This finding is consistent with the conclusions of Hawkins that officers used their moral categorisation of operators to decide the enforcement outcome, notwithstanding the offences' inclusion of all polluters, careless or otherwise.¹⁰¹ The strict liability offences may, however, indirectly facilitate a regulator's ability to prosecute, for, from a legal standpoint, the offences are much easier for a prosecutor to prove, a fact which inevitably bolsters the regulator's bargaining position even outside the courts.¹⁰² Strict liability increases the likelihood of prosecuted cases resulting in conviction and therefore formal sanction - surely an important deterrent factor and one which may help to explain the NRA's confident approach to prosecution.

3.3.3 Operator Wealth & Likelihood of Compliance

It was mentioned earlier that process industries tended to be large, often multinational corporations,¹⁰³ whereas the waste management sector dealt with both large companies and very small operations. The distinction in size and wealth of regulated operators has also been offered as a factor which may be responsible for the distinction in enforcement style between the process industries and waste sectors:

"Those companies regulated by [the process industries sector] can see the sense in going green, they can afford to invest and can see benefits in terms of public profile, waste minimisation and increased efficiency. Companies regulated by WRAs 'are at the end of the line

⁹³ Chester Magistrates' Court

⁹⁴ Northwich Magistrates' Court.

⁹⁵ St Helens Magistrates' Court.

⁹⁶ St Helens Magistrates' Court.

⁹⁷ Knowsley Magistrates' Court.

⁹⁸ Chester Magistrates' court.

⁹⁹ Stockport Magistrates' Court.

¹⁰⁰ Knowsley Magistrates' Court.

¹⁰¹ See 1.2.

¹⁰² See 6.7 where the relationship between strength of bargaining power and strict liability offences is explored.

¹⁰³ 2.1.1.

where everything has a negative value. Every move they make costs them money, they have to break the law."¹⁰⁴

Wealthier operators do tend to be perceived as more responsive to regulatory pressure:

*"Bigger companies are more co-operative because they know what the Agency is and that it has the power to do almost anything. Prosecution of the larger companies is however harder because they defend harder and can afford better lawyers."*¹⁰⁵

While larger firms tend to operate with greater volumes of materials and in this sense are often judged as having a greater capacity for environmental damage, Bardach and Kagan argue that this would be a misplaced assumption. Smaller firms tend not to have the resources to operate in-house compliance programs or employ specific staff for ensuring environmental compliance, and are less concerned about the long term considerations of public image:

*"The most flagrant and serious violations therefore are more likely to be found in smaller enterprises."*¹⁰⁶

The emphasis by process industries respondents of the importance of adverse publicity is consistent with the process industries inspectors' view of operators as 'good apples' concerned about their reputation. As Kagan commented:

*"The good apples are firms...that essentially are guided by some conception of long term interest. They are concerned about their reputations in the marketplace, maintaining smooth labour relations, preventing lawsuits and avoiding the stigma of being labelled a socially irresponsible lawbreaker."*¹⁰⁷

These publicity sensitive 'good apples,' are not necessarily any more concerned about the environment than the rogue operators. A good compliance record is simply more beneficial for these companies, and, where public image is important, the disincentives of hitting the headlines are greater.¹⁰⁸

¹⁰⁴ Waste Management interviewee, September 1997.

¹⁰⁵ Water Quality interviewee, December 1997.

¹⁰⁶ R. Kagan, On Regulatory Inspectorates and the Police, in K. Hawkins, et al. *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.37-66, at pp.46-47.

¹⁰⁷ E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981), p.64.

¹⁰⁸ Analysis of the extent to which the assumption of industry's vulnerability to the publicity of prosecution is justified is conducted in chapter 9.

3.3.3 (i) *Susceptibility to Persuasion*

It seems then that operator size, although not a driver of enforcement style in itself, can be used as a 'rule of thumb' to predict enforcement strategy. Operator size is treated by officers as an indicator of how responsive the operator is to persuasion and education. Such perceived differences in the likelihood of compliance can be used to justify the less adversarial approach adopted in process industries regulation. Regulatees with ample funds tend to be increasingly open to persuasion that environmental improvements will be cost-effective in the long term.¹⁰⁹ The scale and profit margin of many waste operators would not permit realisation of similar long-term benefits. The only available factors with which to induce the compliance of very small scale operations are, therefore, the negative *disincentives* of breach. Regulation of the wealthier operators is, in contrast, assisted by the incentives of cost savings of compliance.

3.3.3(ii) *Vulnerability of Operator & the Ramifications of Formal Enforcement*

In addition to the incentives of improved compliance which can be used to persuade large operators to adjust their practices, it seems that formal enforcement action can have greater ramifications for these publicity sensitive operators. As has been mentioned, the penalties associated with a conviction are often assumed to extend beyond those imposed by the court.¹¹⁰ They theoretically include the consequences of adverse publicity and certain commercial disadvantages, such as the forfeiture of lucrative contracts, the removal of environmental management systems accreditation (e.g. *ISO 9000* or *BS57750*) or retraction of financial support.¹¹¹ This is a common assumption which appears to underlie modern regulation, and which Blowers, in his 1970s analysis of air pollution controls, termed 'mutual enforcement.'¹¹² Richard Navarro, head of legal services at the Agency agrees:

¹⁰⁹ A. Mehta, "The Benefits of IPC: Views from Industry" (1998) 10(4) *Environmental Law & Management*. 190.

¹¹⁰ See generally on this, M. Feeley, *The Process is the Punishment*. (Russell Sage Foundation, London, 1979) p.30, where the author states; 'the time, effort and opportunities lost as a result of being caught up in the (court) system can quickly come to outweigh the penalty.'

¹¹¹ See Gunningham & Grabosky who comment that the operation of commercial interests as regulators and instruments of informal social control is largely neglected, in N. Gunningham, & P. Grabosky, *Smart Regulation*. (Oxford University Press, 1998) at p.106.

¹¹² A. Blowers, *Something in the Air - Corporate Power and the Environment*. (Harper & Row, London, 1994). Mechanisms of mutual enforcement have also been described as 'the delegation of regulatory responsibility' to non-governmental entities giving rise to a means of 'surrogate regulation.' N. Gunningham, & P. Grabosky, *Smart Regulation*. (Oxford University Press, 1998) at p.408-413.

*"The risks for a company, are not simply prosecution and possible imprisonment of directors, but also factors such as loss of reputation, drop in share prices, loss of customer confidence (and) adverse effect on insurance policies."*¹¹³

There is certainly some evidence to support a reasonable belief that adverse publicity arising from Agency court action may ultimately impact on profitability. Interviews confirmed that after one of the hearings attended during this research, which was subsequently reported in *ENDS*, the company concerned stood to lose out on a significant joint enterprise with an American pharmaceutical company who had heard about the prosecution.¹¹⁴ Meetings were held to assuage the concerns expressed by the American partners that the prosecution was a reflection on the competence of the defendant company.¹¹⁵ The same convicted company was also threatened with being taken off a tender list in relation to another transaction, and whilst they managed to persuade the client to reconsider, the threat was nevertheless real.¹¹⁶

One manager of a recently prosecuted company (*Y Ltd*) commented on the impact of civil environmental litigation, and the associated publicity, on one of their competitors (*Z Ltd*). Although *Z Ltd* had successfully defended its case, clients now preferred to pay *Y Ltd* a premium to deal with their waste, rather than send it to their competitor. In contrast, the water companies do not perhaps experience the same degree of accountability to clients:

*"Because (a water company) is a monopoly our compliance record doesn't affect our dealings with our customers. But it does affect our international operations when we bid for work overseas they do often trawl through our compliance records, and if there are any recent prosecutions they want to know the reasons why we have been prosecuted and what the provisions are in this country."*¹¹⁷

The most common response of interviewees from industry was that they were unable to pinpoint any specific lost opportunity or profit which had arisen from enforcement action but that, nevertheless, their belief was that loss of public confidence would prejudice their survival. The threat of adverse publicity and the ripple effect appears to be taken seriously, although industry is not able to say how

¹¹³ C. Beecham, "The Green Gauge." (1997) *In House Lawyer*. Jan p.22..

¹¹⁴ Interview with representative from industry, May 1998.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Interview with manager from water company, August 1998.

substantial the impact is: *"You can't quantify the cost of a conviction, except to say that it is real."*¹¹⁸

Another interviewee whose company had been prosecuted twice the previous year, but who could not point to a specific loss arising out of those convictions, commented:

*"Union Carbide has suffered from Bhopal, not from Bhopal itself, but it now has no world-wide credibility. If we had had any major planning applications this time last year, we would have had great difficulties. The impact of enforcement is rather that it has an effect on the future development potential of the company."*¹¹⁹

Whilst process industries regulation has been characterised in this work as being the sector of pollution control where the risk of prosecution for a deviation from legal requirements is smallest,¹²⁰ the threat to industry at least appears to be a substantial one:

*"The prosecution shook X Ltd. The Managing Director has, shall we say, a new respect for the Agency. We try like hell to stay within the law, but there will always be occasions when something happens.... We have to be whiter than white to survive."*¹²¹

Beyond dealings with clients, one interviewee in particular pointed to the impact of adverse publicity on the workforce. Employees want to believe they work for a 'good' company and companies also put a price on a positive staff morale.¹²²

It seems, then, that the threat of public shaming and its 'ripple effect' for many industry managers does exist (if only at a very generalised and abstract level) and substantially increases the threat of enforcement as against large scale operators. The amplified threat of enforcement at this level of industrial operation offers a persuasive justification for preferring non-formal means of enforcement.

3.3.3(iii) Capacity for Regulatory Grip & Enforcement Style

Further support for the proposition that the wealth and size of the offending operator is important in predicting enforcement style can be taken from enforcement

¹¹⁸ Representative from waste management industry, May 1998.

¹¹⁹ Interviewee from industry October 1998.

¹²⁰ See 3.2.2 and 2.1.1.

¹²¹ Interviewee from waste management industry, May 1998.

¹²² Interview with representative from industry, May 1998.

statistics for unlicensed angling. In addition to pollution control matters, the Environment Agency is responsible for the conservation and regulation of fisheries, and administers a licensing system for fishing.¹²³ Fishing without a licence is an offence incurring fines of up to £2,500. In 1997, the Agency 'blitzed' unlicensed fishing, checking over 30,000 anglers in a period of two weeks.¹²⁴ Prosecutions for fisheries offences topped 4,668 for 1996-97.¹²⁵ The Agency's policy on enforcing rod licensing requirements, has been stated to be:

'(T)he Agency takes a tough line on licence evasion - we will prosecute every angler caught without a licence.' (emphasis added)¹²⁶

Contrast this 'sanctioning' style of enforcement with the flexible policies associated with pollution control offences, and the 235 water pollution prosecutions brought in 1996-97.¹²⁷ It is not, however, the size and wealth of the offender that is important here, it is the strength of regulatory grip which the available enforcement mechanisms provide on this particular offender. While ostensibly both the pollution control regime and fisheries regime have the coextensive purpose of protecting aquatic life, the distinction in enforcement can perhaps be justified on two grounds: Firstly, the rod licensing system provides important income for the Agency. Licence fees pay for the bailiffs who make checks and, crucially, help to fund other Agency activities. There is therefore a financial incentive for the Agency to encourage licence applications. Secondly, and more importantly, the fisheries regime offers no other formal enforcement options than prosecution. Pollution can invite enforcement notices or licence revocation. Issuing a warning to an angler without a licence is of little value, as it is unlikely that the individual will be apprehended again. Static factory polluters, however, can be the subject of a later visit to check that the warning has been heeded.¹²⁸ The same consideration of limited enforcement options applies to the offences of flytipping in waste management. Once the offender is out of sight, it is almost impossible to supervise his future

¹²³ The requirement of rod licences can be found at s.27(9) of the Salmon & Freshwater Fisheries Act 1975.

¹²⁴ Agency press releases - Welsh region (August 1997) and Thames region (May 1997). See also Environment Agency. 'Bank Holiday Licence Blitz.' (1998) *Environment Action*. Spring p.30

¹²⁵ Environment Agency Annual Report and Accounts 1996-97.

¹²⁶ Thames region press release 23rd May 1997.

¹²⁷ See fig 2.3.

¹²⁸ An alternative interpretation of these statistics would be that, although relatively simple to prove, prosecution for these seemingly trivial offences of failure to have a rod licence, still consumes manpower resources of the legal department. This appears to support Diver's conclusions that regulators with broad generalised mandates, seeking to boost enforcement statistics and thereby legitimate their own performance, will concentrate a disproportionate amount of resources on cases with the least potential for producing 'harm.' C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. 257 at page 271-77.

conduct, and this in itself is justification for the policy of automatically prosecuting 'flytippers' or unlicensed operators on discovery.¹²⁹ If unlicensed waste management offences were taken out of waste prosecution statistics, we would probably find the rate of prosecution to be closer to that in the process industries sector.

The result of this range of available enforcement mechanisms is to produce more legalistic styles of enforcement for particular offences, namely unlicensed waste management activities and fisheries offences. Can enforcement tools be used to explain the distinction in enforcement rates as between water quality and process industries regulation? In part, they probably can. While water pollution offences on the whole relate to discharges from static sources, rather than sites operating without a consent or rogue operators polluters discharging when no-one is looking, the enforcement mechanisms available under the Water Resources Act 1991 were traditionally quite limited. It wasn't until the Environment Act 1995 that the enforcement notice was extended to water quality regulation. This newly available mechanism may be responsible for the immediate decline in water pollution prosecutions,¹³⁰ just as a decline in waste management prosecutions in 1996 was attributed to new enforcement powers and the policy of preferring cautions.¹³¹ The availability of enforcement mechanisms is clearly of great importance in determining enforcement style and a lack of enforcement options can direct a regulator further towards an adversarial approach.

3.4 The Inverse Relationship Between Operator Size and Legalistic Enforcement: Distorting Enforcement Priorities?

It certainly seems a bizarre proposition that the approach to environmental enforcement should apply with less formality to those operators who conduct processes involving the largest environmental hazards. As has been pointed out, however, it is not the size of the company itself which is responsible for this position but the fact that regulatory grip on large scale operators can be tightened without the need for legalistic enforcement, and that these operators are assumed to be more susceptible to persuasion to comply and more vulnerable to the ramifications of legalistic enforcement. In what respects can the profile of the regulatory population as a driver of enforcement be seen to be distorting the

¹²⁹ See 3.2.1 (ii).

¹³⁰ See fig 2.3.

¹³¹ NAWRO press release 1996 explaining drop of annual prosecutions from 442 to 400.

Agency's duty to '*prevent or minimise or remedy or mitigate the effects of pollution of the environment*'?¹³²

In layman's terms 'enforcement' relates primarily to the tip of the hierarchy of enforcement mechanisms of prosecutions and notice serving. The conflict of informal conciliatory enforcement practice with the general public's expectations of enforcement was identified as early as 1883 by the first Chief Inspector of the Alkali Inspectorate:

The public are continually confusing or attempting to confound our duties with those of the police....The Government inspectors have been more as teachers raising up the standard of labour in the works."¹³³

The assumptions which permeate the process industries sector approach to regulation; the effectiveness of persuasion, an assumed sensitivity of large companies to public disapproval and the greater potency of the threat of prosecution - are not manifest to the outside world and are not capable of definitive proof. The inverse relationship between operator size and certainty of prosecution can easily give rise to the cynical view that the regulator is so dependent on co-operation and the monopoly of information possessed by regulated companies, that to effect any degree of real regulation, the regulator must make all attempts not to jeopardise that relationship by coercive action. The trust which engenders self-regulation can be viewed as a naive delegation of enforcement giving rise to potential for abuse,¹³⁴ or as a form of 'under regulation.'¹³⁵ Allied to the view of the regulator as dependent on industry as a source of information, is the possibility that these powerful companies also tend to pour more resources into defending prosecutions, causing a protraction of the court process; a factor which may act as a disincentive to prosecute.

It is easy, therefore, to see how aversion to formal enforcement leads to suggestions that the regulator has been 'captured' by its powerful regulatees, and therefore that the Agency has been distracted from its statutory function of environmental protection. There are signs that this perspective is gaining some support. The

¹³² Section 5 of the Environment Act 1995.

¹³³ Adam Smith in Alkali Inspectorate Annual report for 1881, August 1883, p.8., quoted in E. Ashby, *The Politics of Clean Air*. (Clarendon, Oxford, 1981) at p.29.

¹³⁴ See for example, G. Lyons, *A Review of Part I of the Environmental Protection Act and its Implementation*. (World Wide Fund for Nature, London, 1992).

¹³⁵ CF. the view of J. Braithwaite, "Enforcing Self Regulation." (1982) 80 *Michigan Law Review*. 1466 at p.1467 that self-monitoring is an efficient means of regulation whereby industry undertakes more of the costs of regulation (e.g. monitoring apparatus and procedures).

Agency has recently been accused of regulatory capture as the result of undisclosed conflicts of interest. It was suggested that the Agency should make public, details of any of its board members and staff who were members of secret societies such as the Masons.¹³⁶ The Agency's adoption of the terminology of 'customers' when referring to regulated organisations, did nothing to pacify these concerns.¹³⁷ Despite Bugler's¹³⁸ warning from 1972 that, ' *the Inspectorate must abandon its meek conception of itself as a partner,* ' the meeting of equals is still a strong theme in process industries regulation.

3.5 The Inverse Relationship Between Operator Size and Legalistic Enforcement: Justifications

It is possible, however, to counter the argument that the aim of environmental protection is distorted by the profile of the regulatory population. The basis of the distinction in approach directed towards the top end/large operators and the small scale/lower hazard operators seems to be that, whereas those officers dealing with the latter tend to adopt the enforcement style of 'policemen,' as has been stated, process industries inspectors perceive large wealthy operators as far more susceptible to persuasion and negotiation. What grounds are there for these assumptions that co-operative regulation is effective and that large operators are particularly susceptible to the threat of legalistic enforcement?

Firstly, it was clear that the process industries inspectors interviewed were confident of their abilities to persuade large professional operators to continually improve their processes. These inspectors spoke of occasions in which an operator had been persuaded to make multi-million investments in abatement equipment without any threat of enforcement action being necessary.¹³⁹ Secondly, evidence of effective regulation by the compliance-based approach to enforcement is perhaps also provided by the fact that process industries inspectors can rely on the operators themselves for information about compliance levels.¹⁴⁰ Water pollution control and waste management officers, by contrast, consistently put the operator at the bottom of the list as sources of information. The practice of self-monitoring and self-reporting in process industries sector means that the defendants themselves furnish

¹³⁶ See 'The Agency to Out Freemasons,' *The Guardian*. (1997) 17th September, p.9.

¹³⁷ *The Environment Agency and Sustainable Development* (Statutory Guidance issued under s.4 of the Environment Act 1995) December 1995 para 9 (iii). See also P. Brown, "Watchdog: The Moral Maze." (1997) *The Guardian*, G2. 12th November, p.25.

¹³⁸ J. Bugler, *Polluting Britain*. (Penguin, London, 1972) at p.30.

¹³⁹ See particularly, the illustration cited at 6.2.2.

¹⁴⁰ See 3.2.2 (ii).

the court with details of the incident for which they are being prosecuted. This is a further demonstration of the level of trust which exists between the process industries regulator and industry. The reliability of this self-reporting arrangement is safeguarded by the significance attached to an identified failure to report.¹⁴¹ Most process industries installations operate self-monitoring equipment which records unauthorised releases, and may even relay the data to the Agency. If the plant's management team does not take steps to notify the Agency of an incident, the breach will be discovered from plant monitoring records, increasing the likelihood that the company will be prosecuted. There are, however, indications that the level of trust in the honesty of large scale operators is sometimes misplaced. In January 2000, it was revealed that *British Nuclear Fuels* had practised widespread falsification of plutonium data on fuel dispatched to Japan.¹⁴² When we remind ourselves of the trust expressed by RAS inspectors concerning the motives of their operators, there seems to be real cause for concern:

*"...From Sellafield I expect a high degree of professionalism and experience, and, by and large, I know they are not out to con me or to break the law. It is alien to nuclear sites to break the law."*¹⁴³

Finally, whilst the self-regulation mechanisms of the process industries sector contribute to a lesser degree of formal regulatory intervention, the informal approach to enforcement can be further justified by the argument that the sanctions for violating the process industries' controls appear to be higher than in other sectors. Once the Agency formally mobilises the law by initiating court action, the operator's exposure to legal liability is partially deprived of the protective screen of moral ambivalence associated with environmental offences. Once the sanction of legal enforcement has been triggered, both the trust previously invested in the operator in the form of delegating regulatory functions and the power and resources of the operator, can condemn the offender in diminishing the likelihood that the operator will be found criminally liable, but otherwise virtuous.¹⁴⁴ Further evidence

¹⁴¹The Agency's current policy on prosecution states that co-operation with the Agency after an incident is a factor which weighs against taking a prosecution. The Environment Agency. *Enforcement and Prosecution Policy*. November 1998.

¹⁴² P. Brown & R. Evans, "Threat to shut down Sellafield N-plant." (2000) *The Guardian*. February 18th. See also the story of the case of deliberate dumping of radioactive waste by a devious operator who again falsified documents to obscure what she had done. N. Hopkins, 'These drums were dumped in a field where children played - 18 months later investigators found they were full of nuclear waste.' (1999) *The Guardian*. December 9th.

¹⁴³ RSR interviewee, June 1998. Compare this view with the reports in 1998 of multiple breaches in the nuclear sector. See "The Experiment Ends But Dounreay Lives On." *The Independent*, (1998) June 6th, p.12.

¹⁴⁴ See P. De Prez, "Environment Agency v ICI Chemicals & Polymers." (1998) 10(4) *Environmental Law & Management* 187. It seems that the scale and resources of ICI went against the operator in this

to substantiate the magnitude of the threat of legal enforcement against large operators can be taken from the 25 Agency prosecutions attended in the course of this research.¹⁴⁵ Large corporate defendants tended to mitigate more extensively and took great pains to defend and preserve their public reputation. They generally brought a small army of staff with them, often filling the smaller courtrooms usually reserved for non-police prosecutions. At an *ICI* hearing, one court usher commented that they always brought a '*crowd*' with them. On one occasion when such a '*crowd*' was present, the Magistrates demanded to know why so many personnel were in attendance. They were told that many were from relevant departments (environmental compliance and legal) and had come as a '*mark of respect to the court.*' The same defendant seemed concerned to salvage their corporate image, handing out press releases to the public gallery, although no press were present.

3.6 Comment & Conclusion

This chapter has provided testimony to Hawkins' assertion that the perceived profile of the regulatory population plays an important part in determining the style of enforcement adopted, and that otherwise, the enforcement approach adopted by different enforcers is remarkably similar.¹⁴⁶ For example, although the size of the operator and the likelihood of prosecution are related, the relationship is not a causal one. The size of an operator does not determine the likelihood of court action, it is rather the capacity for regulatory grip on this particular scale of operator which is important. Parliament's generosity in its provision of enforcement mechanisms and the perceived vulnerability of the operator to legalistic enforcement are therefore crucial in determining enforcement style.

It has also been noted, however, that the profile of the regulator should not be ignored in this respect. Although the relative age and experience of personnel seems to have little relationship with views on enforcement, the legislative armoury of the organisation, in particular the ease with which legal action is taken, the distinction between discharge and process orientation¹⁴⁷ and the range of enforcement mechanisms provided by Parliament are important in determining the formality of enforcement adopted by the regulator.

prosecution, as the judge clearly felt their resources meant they could guard against very small risks even when the Environment Agency had failed to identify them.

¹⁴⁵ Discussed in chapter 5.

¹⁴⁶ K. Hawkins, *Environment & Enforcement*. (Clarendon, Oxford, 1984), p.6. See also 1.2.

¹⁴⁷ Unannounced inspections which are facilitated by a discharge based regime, facilitates discovery of violations.

Certainly, the conclusion in this chapter that the style of enforcement varies generally according to the perceived size and wealth of the operator is controversial. It is somewhat of a paradox that process industries operators whose activities involve such great degrees of environmental hazard run a lesser risk of prosecution than the relatively innocuous angler or small scale polluter. The rationalisations offered by Agency officers suggest that a major change has emerged in regulation that the function of enforcement as against the large scale polluter is now shared. It is no longer the monopolistic domain of the statutorily designated regulatory body, but is shared with the operators' consumers, financial institutions and the public at large, all of whom can levy sanctions on the operator for unacceptable environmental performance. At the time of Hawkins' study this was a dimension of enforcement which was very underdeveloped and so did not feature in his study of compliance and enforcement.¹⁴⁸ These conclusions mean that despite continued reliance on a compliance-oriented style of enforcement, it is not true to say that nothing has changed and, in fact, the maintained commitment to compliance-based enforcement conceals a shift in bargaining power between regulator and operator. The projected impact of prosecution is substantial because of the aversion to negative publicity and this therefore suggests that co-operative strategies of enforcement are effective in obtaining compliance.

In maintaining a strong emphasis on compliance-based enforcement at the top end of pollution control, however justifiable, the Agency takes the risk of adverse inferences about the suitability or even propriety of its enforcement strategies. Environmental regulation must effect a compromise between 'technical effectiveness and political responsiveness.'¹⁴⁹ In other words, the dictates of experience and judgement of Agency inspectors as regards the competence, responsiveness and willingness to comply of large operators must be tempered by the need to maintain public confidence in Agency regulation.¹⁵⁰ This tension relates to Hawkins' notion of 'political ambivalence.'

¹⁴⁸ The rebuttal of Hawkins' monopolistic model of enforcement resumes in chapter 9.

¹⁴⁹ T. O'Riordan, & A. Weale, "Administrative Reorganisation Policy Change: The Case of HMIP," (1989) 67 *Public Administration*. 277 at 279.

¹⁵⁰ The 'seductive' assumption that the pursuit of 'effective' regulation is uncontroversial has been questioned in T. Jewell, & J. Steele, "UK Regulatory Reform & Sustainable Development: The Environment Act 1995" (1997) *Journal of Environmental Law*. 280.

The state of affairs described above means that political ambivalence is unlikely to have diminished as a driver of enforcement style. The next chapter will examine the extent to which public demand impacts on enforcement style in the Agency.



Chapter 4

THE DRIVER OF POLITICAL AMBIVALENCE

"Prestige and survival are not normally accepted as legitimate ends of administrative behaviour.... But prestige and survival...are real factors in decisions....The management of appearances towards potentially critical constituencies imprints agency prosecution policy with a concern for self-preservation.'

(K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.195).



CHAPTER 4

THE DRIVER OF POLITICAL AMBIVALENCE

*"...(T)he police tend to select law violators not according to legal prescriptions alone, but also according to how closely enforcement approximates the expectations of the community."*¹

The Agency's 'environment' consists not only of those subject to its regulatory influence, but those whom it is designed to protect. This chapter examines the extent to which pressure from the public at large can impact on enforcement style.

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- 4.3 The Legal & Policy Preference for Sound Science
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¹R. Quinney, *The Social Reality of Crime*. (Boston, Little Brown, 1970), at p.117.

4.1 Introduction

Hawkins' notion of 'political ambivalence' was a central theme of his model of enforcement. Regulators must concentrate their efforts not only on regulating at a functional level by securing compliance of operators, but to ensure survival they must also act at a symbolic level in order to satisfy society's demands for the appearance of an efficient and powerful regulator.² We have seen in chapter 3 that Agency officers, particularly in the process industries sector, perceive regulatees as generally responsive to pressure to improve compliance without the need for sanctioning styles of enforcement. This results in a preference for informal, non-legalistic styles of enforcement. This responsiveness to the regulator's perception of its operator constituency must, however, be balanced against the likelihood of the public viewing compliance-based enforcement as inaction and malaise on the part of the regulator.

Hawkins recognised the importance of public reaction and expectation as a driver of enforcement style in terms of its capacity to limit the regulator's ability to compromise and to negotiate a solution to non-compliance:

*"Complaints also threaten trouble for the agency. The involvement of a third party can make any possible pollution a public matter in which concern about the efficiency of the authority and its responsiveness may be raised, a matter of considerable significance for an agency operating in a political environment marked by considerable ambivalence."*³

The need for image management on the part of any regulator in the public eye, meant that officers' classification of instances of non-compliance was affected not only by the perceived motive and type of offender, but also by the potential impact on the regulator's public relations:

*"For many field men the working definition of a 'serious' pollution is 'basically anything that's going to cause a great amount of public reaction.'"*⁴

² "Selecting cases for prosecution is in large part a consequence of the organisational need to manage appearances before these two ill-defined, but none the less real constituencies with an interest in agency work." K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) at p.194.

³ Ibid. at p.97.

⁴ Ibid.

Clearly, Hawkins attaches some importance to public feeling in terms of influencing the likelihood of a prosecution. The main submission of this chapter is that political ambivalence in the form of the need to respond to public expectation can be seen more explicitly than ever to be an important driver of enforcement style in the Environment Agency, although this is not acknowledged at a formal policy level.

This chapter briefly explores the relationship between public feeling and enforcement action by the Agency; first of all, by examining the extent to which public expectation is recognised as a driver of enforcement in the Agency's legislative mandate⁵ and in Government and Agency policy, secondly, by looking at whether public expectation is in practice a driver of enforcement style and, finally, by exploring the extent to which this form of political ambivalence is an unwarranted distraction from the Agency's statutory duty to; '*prevent or minimise or remedy or mitigate the effects of pollution of the environment*'.⁶ This chapter concludes with some general remarks on the proper balance between scientific approaches to enforcement and the need to respond to public feeling. In the course of this chapter, reference is once again made to the survey and interviews with Agency field officers discussed in chapters 2 and 3.

4.2 The Dilemma of Political Ambivalence Vs Technical Effectiveness

The public are not necessarily the best judges of what constitutes pollution or a threat to the environment, nor of the relative seriousness of different incidents.⁷ Nevertheless, when public concern is voiced, it must be seen to be dealt with in order to ensure that pollution control enforcement mechanisms are seen to be democratically accountable. The notion that public regulators are increasingly

⁵ There are a number of formal statutory mechanisms which acknowledge rights of public participation in the regulatory licensing process; environmental impact assessments (Directive 85/337 EC, implemented by Town & Country Planning (Assessment of Environmental Effects) Regulations 1988, SI 1988 No.1199), and rights of notification and representation in relation to applications for environmental licences (for example, in relation to Integrated Pollution Control; Environmental Protection Act 1990, Schedule 1, Part I, 1(2) requiring advertisement of applications and 2(5) requiring consideration of public representations, and the Schedule 1, Part II 6(2) and 6(6) respectively for variations which involve a 'substantial change' to the IPC process. For discharge consents the provisions are to be found in Water Resources Act 1991, Schedule 10, 1(4) for advertisement of applications and 2(1) for representations from the public). Only very limited rights of standing exist to challenge these licences once they have been granted.

⁶ Section 5 of the Environment Act 1995.

⁷ See K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) at p.97: "*Complainants are regarded as untrustworthy sources of information: untrained eyes are prone to inaccuracy and many succumb to the temptation of exaggeration.*"

required to demonstrate a commitment to democratic accountability is not new.⁸ The pressure for democratisation in environmental regulation is probably greater than in other fields due to the legacy of local authority involvement in this area,⁹ alongside common portrayals of the environment as public 'property'.¹⁰ The Agency must therefore operate a careful balance between effective pollution control which disregards public feeling and forfeits public confidence (technical effectiveness) and an approach which wastes valuable resources in attending to popular fads. Despite the clear dilemma posed here, there are few clues at the formal policy level as to how public expectations are to be dealt with; a fact which is at odds with the Agency's policy of making enforcement considerations explicit and transparent.¹¹

4.3 The Legal & Policy Preference for Sound Science

In the context of planning law matters, public perceptions of risk have recently been held to constitute a permissible consideration in the refusal of planning permission.¹² It appears then that allowing public feeling to affect regulatory decisions would not normally render the decision ultra vires, although such considerations do not sit easily with the Agency's instructions to 'act in accordance with sound science'.¹³ So what indicators are there in the legal and policy framework of environmental protection that public feeling is a relevant consideration?

The two concepts which lie at the crux of modern environmental protection law and policy in the United Kingdom (UK) can fairly be identified as the control of 'pollution' (and pollution risks)¹⁴ and the pursuit of 'sustainable development'.¹⁵ It

⁸ T. Jewell, & J. Steele, *Law in Environmental Decision-Making*. (Clarendon Press, Oxford, 1998) at p.77.

⁹ Local authorities were responsible for waste regulation up until the accession of the Agency. Sections 11-19 EA 1995, which create regional committees in the Agency, were designed specifically to preserve responsiveness to local needs.

¹⁰ The root of which is probably traceable to Hardin's essay, G. Hardin, "Tragedy of the Commons." (1976) 162 *Science*. 1243.

¹¹ The Environment Agency. *Enforcement and Prosecution Policy*. November 1998., paras 14-15.

¹² *Newport CBC v Secretary of State for Wales*, [1998] (CA) *Journal of Planning & Environmental Law* 377 (where it was stated that public fear was a material consideration for the purpose of planning decisions, whether or not that fear was substantiated).

¹³ *The Environment Agency and Sustainable Development* (Statutory Guidance issued under s.4 of the Environment Act 1995) December 1995 issued under s.4 of the Environment Act 1995) December 1995, at para 5.6.

¹⁴ Duties placed on pre-Agency regulators related to pollution prevention and minimisation (see s.36(3) Environmental Protection Act 1990 and now s.5 Environment Act 1995) and many environmental offences are based on treatment of pollution or pollution risks (e.g. s.85(1) Water Resources Act 1991; s.33(1)(c) Environmental Protection Act 1990).

¹⁵ Section 4 of the Environment Act 1995 states that the Agency is under a duty to; 'make a contribution to the attainment of sustainable development.'

seems that the application of both these concepts is to be based on 'sound science' (i.e. basing action on proven facts). Taking the concept of 'pollution' first, a Select Committee convened to evaluate application of the 'polluter pays' principle¹⁶ explored two definitions of 'pollution,' one of which centred on the acceptability of discharges:¹⁷

"...[T]he consequences of discharge into the environment of materials which in the short or long term are offensive and socially unacceptable."

whilst the other focused on objective proof of harm or interference:

"...[T]he introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity or interferences with legitimate uses of the environment."

It is this second definition which has found a place in environmental legislation.¹⁸ It seems, therefore, that the statutory regime of environmental protection in the UK focuses on the control of objective damage and does not perhaps contemplate control of those discharges which are 'socially unacceptable' but which result in no proven damage. Further support for this proposition can be taken from the Agency's duty to make a contribution to sustainable development.¹⁹ Statutory guidance on the performance of this duty emphasises reliance on 'sound science' and, once again, makes no explicit reference to social definitions of risk.²⁰

The last Government's guidance on regulatory appraisal required that a Compliance Cost Assessment be conducted for all proposals for new regulation.²¹ On the subject of the public's perception of risks, the guidance stated that the extent to which these perceptions were allowed to influence policy decisions was to be a matter for explicit ministerial judgement.²² This guidance demonstrates a lack of willingness by the Government to grasp the nettle of public expectations and to acknowledge their utility in risk assessment.

¹⁶ That is, the ideal that those who are the source of pollution should pay for the consequences.

¹⁷ House of Lords Select Committee on EC. *The Polluter Pays Principle*. (10th Report) HL 131, Session 1982-83.

¹⁸ Section 1(3) Environmental Protection Act 1990.

¹⁹ Section 4 Environment Act 1995.

²⁰ Op cit n.13.

²¹ Deregulation Task Force: Annual Report 1994/95.

²² Parliamentary Office of Science and Technology (1996), *Safety in Numbers?: Risk Assessment and Environmental Protection*. Report 81, para 24.

If we direct our focus instead at the Agency's own policy statements, is there any evidence to suggest that public feeling is a driver of environmental enforcement? The Agency uses a '*Public Interest*' test²³ to inform its decisions as to when to prosecute. This test, both by its title and by its public availability, implicitly acknowledges the necessary accountability of a prosecuting body to the public.²⁴ Agency field officers are equipped with 'Public Interest' forms to assist them in deciding whether to recommend prosecution after visiting an incident. These forms consist largely of tick boxes, two of which ask the officer(s) in attendance to record whether there is any local public interest and whether there is any press interest in the incident. Either of these factors has the potential to tip the balance in favour of prosecution.²⁵ Here we have our first indication that public reaction may be being treated as a relevant factor in environmental enforcement.

The Environment Agency's Customer Charter²⁶ expressly incorporates responsiveness to public complaints into the standards which can be expected from the Agency. Specifically, public reports of pollution incidents are to be assessed within two hours of the complaint being received, and attendance at the incident is to be within two hours if classed as an emergency, and within 24 hours if 'less urgent.' Other than this initial differentiation, there appears to be no screening process applied to complaints.²⁷ The result is that a huge number of public complaints require the Agency to make a site visit. This self-imposed benchmark contained in the Charter necessarily means that other enforcement work must sometimes be postponed in favour of dealing with incidents which have produced a public reaction.²⁸ The role of the Agency as regulator is beginning to take on an appearance of being more than one of environmental protection, but also of serving the public by reacting to its complaints. Even when a pollution threat is considered nominal by the scientific community, it must be seen to be dealt with if the public considers the threat to be real.

²³ The Environment Agency. *Enforcement and Prosecution Policy*. November 1998.

²⁴ T. Hetherington, *Prosecution and the Public Interest*. (Waterlow Publishers, 1989) at p.143.

²⁵ Although not detailed in the Public Interest test, the factors listed there are not exhaustive.

²⁶ The Environment Agency (1996) Environment Agency Enforcement Code of Practice - May 1996 at p.9.

²⁷ Cf. Bardach & Kagan's reference to a US Air Pollution Control body requiring five complaints before action was taken (E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981) at p.167.

²⁸ The attainment of inspection targets has been a particular problem in waste management. In 1995-96, the author's survey of Waste Regulation Authorities (predecessors of the Agency) showed that target achievement ranged from 18% to 95.7%.

Although both the law's definition of pollution and government policy neatly avoid the issue of political responsiveness to public perceptions of risk, it is possible to detect a theme of accountability to the general public in the Agency's own policies, although the specific issue of responsiveness to public feeling is once again not mentioned.

4.4 Public Expectation as a Driver of Prosecution Practice

Narrowing the focus once again, is it possible to discern from conversations with individual officers in the Agency and observation of Agency prosecutions whether public feeling is in fact a driver of enforcement decisions? The general public tends to equate frequent prosecution and heavy fines with 'effective regulation,' and in turn, court action is viewed as a '*final indicator of the state's seriousness of purpose*.'²⁹ The comment of the first Chief Inspector of the Alkali Inspectorate referred to in the last chapter is apt here:

The public are continually confusing or attempting to confound our duties with those of the police....The Government inspectors have been more as teachers raising up the standard of labour in the works."³⁰

It is submitted that this diversity between regulatory and public notions of enforcement still holds true. Enforcement for a regulator is a matter of achieving compliance by whatever means available. Effective enforcement to a regulator can, therefore, include court action, enforcement notices, informal warnings, persuasion and education, whereas the view of the public generally, is that 'enforcement' necessarily involves a court appearance.

When public pressure for visible enforcement action materialises, what impact does it have on the regulatory process? Does public expectation ever tip the balance in favour of a prosecution where the hazard or culpability elements of the incident would not alone have justified bringing the case to court? While public demand is certainly not the primary driver of enforcement style, the author's communications with Agency officers suggest that it does play a significant role as a secondary consideration in some cases. The survey discussed in chapter 3 presented respondents with a fictional water pollution incident caused by a company

²⁹ P. Yeager, *The Limits of Law: The Public Regulation of Private Pollution*. (Cambridge University Press, Cambridge, 1991), p.251.

³⁰ Adam Smith, Alkali Inspectorate Annual report for 1881, August 1883, p.8, quoted in E. Ashby, *The Politics of Clean Air*. (Clarendon, Oxford, 1981). at p.29.

manufacturing solvents. Only 11% of respondents identified 'public feeling' as one of the two main considerations which would influence them in deciding whether to recommend a prosecution.³¹ In addition, only 5% of officers thought that 'responding to public concern' was the most important function of the Agency, although 41% selected it as one of the three most important functions.

While this 'secondary' status of public concern was a view held by a number of officers interviewed, there were many others who expressed concern that Agency action was sometimes driven by public opinion. These officers said that they were aware that there was a need for the Agency to respond to public opinion, but generally felt that the starting point should always be sound science. Indeed, five Agency officers interviewed by the writer spoke of instances of public pressure necessitating enforcement action which would, on the regulator's assessment of the facts, have been deemed unnecessary. One officer referred to the *Sea Empress* case as an example of public outcry resulting in an Agency prosecution.³² The *Sea Empress* was a tanker which was grounded off the Pembrokeshire coast in February 1996, spilling over 70,000 tonnes of crude oil into the sea. The Environment Agency's recent prosecution of Milford Haven Port Authority for their part in this incident was likely to have been prompted by a *Friends of the Earth* pressure campaign.³³ Recourse to the courts in such cases provides a means of pre-empting public criticism or allegations of under-enforcement by the Agency.³⁴ Prior to the court hearing, one Agency officer commented; "If it [the prosecution] fails, we will say, 'well that's the courts for you.' If we succeed, we can say, 'we did it!'"³⁵ By looking to the courts to adjudicate in such cases, the Agency vindicates itself in the eyes of the public. The court's decision to fine the defendants four million pounds can only enhance the Agency's image as a powerful regulator. Alternatively, if the defendant authority had escaped relatively unscathed, the focus for criticism would have been the courts rather than the Agency.

³¹ The other factors they could have chosen included; the fact of a previous incident, absence of an overflow alarm, fishkill, failure by the company to report the incident and previous warning issued to the company.

³² See "£4 Million Fine for Oil Spill May Put Port Jobs in Jeopardy." (1999) *The Times*, 16th January.

³³ P. Brown, "Friends of the Earth to Sue Over Sea Empress." (1997), *The Guardian*, February 15, p.11.

³⁴ See for example; "Toothless Tiger on the Run", (1997) *The Guardian* 23rd April, House of Commons Select Committee on the Environment. *The Environmental Impact of Cement Manufacture*. 1996-97 HC 124; also reported at ENDS Rep 266 March 1997 p.30 and the House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484.

³⁵ Environmental Protection Manager, March 1998.

From 1996 to early 1998, the author attended 25 Agency prosecutions,³⁶ two of which it seemed had been influenced by levels of public concern which were not substantiated by scientific evidence of harm produced by the incident. One such case involved the operators of a hazardous waste incinerator who had mistakenly incinerated a formula containing iodine which produced a hovering violet plume above their site. Local residents had complained to the Agency. The incident was dealt with by the company promptly and, according to the Agency, had caused no actual or potential harm to the environment. The court was told that iodine, although vivid in appearance, was innocuous; this was demonstrated by the fact that it was used on the skin to facilitate x-rays. This incident featured neither potential harm to the environment, nor clear culpability on the part of the defendant, but did produce a temporary but vivid plume on the horizon which caused disproportionate public alarm. In an interview, a manager from the defendant company indicated that the Agency's original recommendation had been not to prosecute, but that public reaction had prompted the reversal of that recommendation:

*"That incident was not damaging in environmental terms and was not potentially harmful, but to the people of [Blankshire] it was hugely damaging. Politically, we are a very high profile plant. If the prosecution hadn't been brought, the public would have been incensed - harm was almost irrelevant at that point - the case was brought to placate the public."*³⁷

The prosecution of a detergent spillage serves to further highlight the impact public expectation can have on the success of environmental prosecutions. The spillage involved the discharge of more than eighteen tonnes of washing up liquid into an already heavily polluted river. On meeting a weir, the discharge formed a foam carpet of fantastic proportions, described on local news as a '*man-made winter wonderland along a ten mile stretch of the river*'.³⁸ The Environment Agency received over 50 complaints from the public, but a pollution control officer involved in the case commented:

*"On a scale of 1 to 10, the public's perception of the incident was about 9, and the environmental damage caused by the incident was about 1."*³⁹

³⁶ See chapter 5 on these.

³⁷ Interview with respondent from industry, May 1998.

³⁸ News Northwest (BBC) 6th August 1997.

³⁹ Communication with Agency officer August, 1997.

At the prosecution hearing,⁴⁰ the Agency made no allegations of fault on the part of the defendant, or of environmental impact (in fact it seemed that the only damage was temporary, and concerned merely the aesthetic value of the river). The court still insisted that this was '*a very serious case*,' and fined the company £7,000. The public interest in this case probably explains why, out of the 25 cases observed, it was this case which resulted in conviction in the shortest space of time from the date of the incident.⁴¹

It is suggested then, that public expectation is a significant driver of enforcement style, if only in *occasionally* tipping the balance in favour of prosecution. There was certainly no convincing suggestion from interviewees that public pressure to prosecute trumped other factors in deciding whether to prosecute, but that it was a supplementary factor which was capable of having a catalytic effect on the formality of enforcement action taken. The impact of public feeling on enforcement is as a 'positive' driver, that is, in generally increasing the number of cases which the Agency views as suitable for prosecution.⁴²

Having suggested that public expectation is indeed a significant driver of prosecution and enforcement practice, it is appropriate to assess Hawkins' conclusion that such considerations are not normally accepted as legitimate ends of administrative behaviour.⁴³ This is particularly important given the apparent failure of the Agency's legislative mandate to deal with the relevance of public expectation. What arguments can be made out to support or dispute the propriety of allowing public pressure to influence decisions about prosecution?

4.5 The Role of Public Expectation: Distorting Enforcement Priorities

Once public feeling is acknowledged as playing a part in decisions about enforcement and prosecution, there are broadly two views which can be taken. One is to interpret this as a form of 'regulatory' capture whereby values other than those of the regulatory organisation's legislative mandate are adopted by the regulator and

⁴⁰ Northwich Magistrates' Courts - 6th August 1997.

⁴¹ Six months.

⁴² It is usually but not always the case that public pressure favours prosecution. The Agency's prosecution of a Health Trust for illegal disposal of clinical waste, proved unpopular when a media report pointed out that the legal costs and fines paid by the Health Trust were equivalent to a hip operation. A similar case has arisen and officers were extremely reluctant to make the decision of whether to prosecute and deterred it to their General Manager. Davies, M.J (1998) *The Agency Lawyer's View*. Paper presented at the Prosecution by Regulatory Bodies Conference, September 1998, University of Oxford.

⁴³ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), p.195.

allowed to unduly influence the enforcement process.⁴⁴ The alternative view is that the use of public feeling as a factor in deciding when to prosecute can be seen to be entirely consistent with the ultimate aim of environmental protection.

There are certainly two arguments which can be used to suggest that any formal consideration of public feeling results in a distortion of the Agency's environmental protection function and also undermines the Agency's commitment to 'firm but fair' regulation. These can be referred to as the 'due process' argument and the 'opportunity costs' argument.

4.5.1 The 'Due Process' Argument (or Undermining 'Firm but Fair' Regulation)

When public feeling conflicts with scientific evaluation of a risk or incident, conceding to the public's expectation of enforcement may be argued to undermine the code of 'firm but fair' enforcement laid down in the Agency's Enforcement and Prosecution Policy.⁴⁵ This code includes the closely related principles of '**targeting**' (*'making sure that regulatory effort is directed primarily towards those whose activities give rise to or risk of serious environmental damage' (sic)*)⁴⁶ and '**proportionality**' of enforcement (*balancing action to protect the environment against risks and costs*).⁴⁷ These two principles both require that the Agency's enforcement response should be commensurate with the environmental risk posed by an incident or breach. Clearly, a decision to prosecute a trivial incident at a normally superbly managed solvents factory due to the public's exaggerated concerns, defeats both targeting *and* proportionality. It is also easy to see how enforcement driven by public feeling could interfere with the enforcement policy's commitment to '**consistency**' in enforcement.⁴⁸ A water pollution incident causing the death of ten or twenty fish may result in public pressure to prosecute in some regions of the country but relative indifference in another. Yet the principle of consistent enforcement requires that both incidents, although geographically separate, be treated in a like manner. These arguments can be at least partially

⁴⁴ Details of the notion of 'regulatory capture' in particular can be found at; C. Wells, *Corporations and Criminal Responsibility*. (Clarendon, Oxford, 1993) at p.29. See also on this point, L. Snider, "Co-operative Models & Corporate Crime: Panacea or Cop-Out?" (1990) 36(3) *Crime & Delinquency*. 373, A. Ogus, et al. *Policing Pollution: A Study of Regulation and Enforcement*. (Oxford University Press, Oxford, 1982),, P. H Schuck, "The Curious Case of the Indicted Meat Inspectors." *Harpers Magazine*. (1972) September and I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992).

⁴⁵ The Environment Agency. *Enforcement and Prosecution Policy*. November 1998., paras 10-15.

⁴⁶ Ibid at para 16.

⁴⁷ Ibid at para 10.

⁴⁸ Ibid paras 12-13.

countered by arguing that responding to public outrage can be vindicated as advancing the cause of another principle of environmental policy, of international (and perhaps therefore greater) standing; namely that of precautionary action.⁴⁹

The precautionary principle has been defined as:

*'...where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'*⁵⁰

Precautionary action therefore acknowledges that it may be prudent to act in advance of scientifically proven risks. This principle's rejection of scientifically proven risks as the sole determinant of proposed action could perhaps be used to support some cases of responding to public opinion where scientific/technical assessments do not support the level of concern expressed.

4.5.2 The 'Opportunity Costs' Argument

Every regulator's resources are finite. When a decision is taken to direct these resources at, for example, enforcement to assuage public concern, this inevitably means that the pursuit of other, possibly more beneficial activities (such as environmental protection), is forfeited. The benefits which are lost in this way are called 'opportunity costs.' When the course of action chosen is to take regulatory action to assuage public concern, the resources involved (and therefore opportunity costs) can be substantial:

*"Sometimes you may have to spend hundreds of thousands of pounds to show the public that there is no environmental risk. But at least then you can say there is no risk."*⁵¹

This was almost certainly a reference to the House of Commons Select Committee investigation of the Agency's regulation of the *Castle Cement* site at Clitheroe.⁵² Local residents had complained that the burning of SLFs (substitute liquid fuels) at the site was creating a health risk to the local population. The Agency remained

⁴⁹ *R v Secretary of State for Trade & Industry ex parte Duddridge* [1994] QBD Env LR 151, where the court stated that UK endorsement of the principle indicated no more than political will to accept EC policy formulated on the basis of the precautionary principle.

⁵⁰ Principle 15, *Rio Declaration* (1992).

⁵¹ Environmental Protection Manager, October 1997.

⁵² See House of Commons Select Committee on the Environment. *The Environmental Impact of Cement Manufacture*. 1996-97 HC 124..

convinced that SLF was far less harmful than burning coal (the fuel used prior to SLFs), but responded to public demands by spending significant funds on research and air quality monitoring in the area and by making fifteen procedural changes to its regulation of cement kilns using SLFs.⁵³ The *Castle Cement* case is a stark illustration of the cost of responding to public concern. Whilst neither scientific nor legal evidence supported public fears, (no offence had been committed by *Castle's* burning of SLF) the cost of air quality monitoring at the site and changes in regulatory arrangements fell to be absorbed by Agency funds.⁵⁴ The *Castle Cement* saga is an instance of over one million pounds of Agency resources being paid to alleviate the public's fears, and without necessarily producing environmental benefit or improvement. The danger of this indulgence is, of course, that these resources could otherwise be used for legalistic and systematic enforcement.⁵⁵

The few officers who recounted anecdotes of the Agency responding to public fears and acting against the dictates of scientific risk assessment were clearly unhappy about the diversion of resources from systematic enforcement. They viewed such efforts as an unnecessary distraction from the Agency's function of preventing and minimising pollution.⁵⁶ Yet, whilst the Agency must not lean too far in the direction of political responsiveness, there are clear arguments in support of taking public expectations on board in the performance of regulatory functions. These can be referred to as the 'corollary of co-operative regulation' argument and the 'optimal deterrence' argument.

⁵³ The changes in regulatory strategy affected the Agency's approach to licence applications, particularly by extending arrangements for consultation with the public and with local authorities. The Environment Agency. *The Environment Agency's Response to the House of Commons Environment Committee Report on the Environmental Impact of Cement Manufacture*.

⁵⁴ Provisions which enable the Agency to recover 'costs' from the polluter relate only to works and operations in order to prevent or minimise water pollution, or require some criminal liability on the part of the polluter relating to the matter for which costs are claimed. Monitoring costs relating to lawful air pollution do not fall within these provisions. See s.161 Water Resources Act 1991 and s.35 Powers of the Criminal Courts Act 1973.

⁵⁵ See S. Silbey, "The Consequences of Responsive Regulation", in K. Hawkins, et al *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.145-168.

⁵⁶ Resources directed towards low-level or negligible risks represent a distraction from site inspection performance, an area where the Agency has been experiencing difficulties (see (1998) *Agency Makes a Mess of Waste*, ENDS Rep 280, May, p.25 where it was alleged that the dogged pursuit of inspection targets had resulted in some cases of recording inspections without actually entering the site, or revisiting closed sites unnecessarily, at p.26). It has been suggested that it is the inspection targets laid down in Waste Management Paper IV which are out of line (House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484, at 238).

4.5.3 The 'Corollary of Co-operative Regulation' Argument

By refusing to allow public perceptions to act as a driver in the enforcement process, the Agency would risk blows to its credibility and a decline in public support. The results of the survey mentioned earlier suggested that officers did attach significant importance to public credibility. A total of **23%** of officers surveyed thought that the most important outcome of a prosecution was the '*demonstration to society that the regulator is a tough regulator*,' and **67%** chose this as one of the three most important outcomes of a prosecution.⁵⁷ Moreover, there is empirical evidence that public confidence in bureaucracy cannot be taken for granted. Research has shown that public confidence in advice from officials is low. While **80%** would trust information from environmental organisations, **12.8%** would trust such information from companies and only **7.6%** would trust government advice.⁵⁸ Perhaps the increased public credibility achieved by the Agency's response to the *Castle Cement* incident was worth the one million pounds price tag, particularly for an area of regulation so often treated with distrust in the past.⁵⁹ A regulator that refuses to take into account public expectation in its decisions of when or whether to prosecute may jeopardise the volunteering of information by the public (a public without confidence in the regulator is unlikely to report misdeeds because they will view such an exercise as futile) or even involve the Agency in expensive defensive activities such as the appearance before a public inquiry or review court.

The key to understanding how the credibility of a regulator and conceptions of risk are linked, is to look at the different methods of risk assessment adopted by the regulator and the public. The inspector's view focuses on scientific risk assessment of an operator's technology, a narrow perception of risk - whereas society's perception of risk is influenced by its understanding of how this technology has traditionally been regulated.⁶⁰ Take the UK tradition of regulation, particularly of

⁵⁷ Other options included; the penalty handed down by the court, publicity, shame of a court appearance, recovery of Agency costs and use of company resources to defend the case.

⁵⁸ Parliamentary Office of Science and Technology (1996), *Safety in Numbers?: Risk Assessment and Environmental Protection*. Report 81, p.42.

⁵⁹ See J. Bugler, *Polluting Britain*. (Penguin, London, 1972)

M. Frankel, *Social Audit - A Special Report: The Alkali Inspectorate*. (Social Audit Ltd, London, 1974), E. Ashby, *The Politics of Clean Air*. (Clarendon, Oxford, 1981) and A. Blowers, *Something in the Air - Corporate Power and the Environment*. (Harper & Row, London, 1984).

⁶⁰B. Wynne, *Risk Management and Hazardous Waste: Implementation and the Dialectic of Credibility*. (Springer-Verlag, Berlin, 1987), particularly pp.356-63.

the large scale chemical industries, which has reportedly been associated with low public profile, secrecy and 'cosy relationships':⁶¹

*"Nor has Britain's regulatory style developed an elaborate concern with mechanisms of due process; too much was left to the confidential discretion of the regulatory official. Political responsiveness was never a prominent consideration; the public interest was generally regarded as being served by a quasi-paternalistic arrangement of collaboration between the inspectorates and industry."*⁶²

Although this observation is ten years old, it still has some application to contemporary regulation. Only last year, the Royal Commission on Environmental Pollution reported an '*erosion of trust*' in environmental regulation,⁶³ and a House of Commons Select Committee remarked with disappointment on a '*dwindling public confidence in the Agency's suitability*' for its enforcement role.⁶⁴ The informal regulatory arrangements referred to above are likely to cause suspicion amongst members of the public. This suspicion can, in turn, enhance the public's perception of risk associated with these industries. For example, if there is an existing fear that an incinerator's emissions present a threat to the health of the local community, how much greater that fear will be if the public also believes that the regulator has been captured by industry, and that enforcement will be less stringent as a result. These co-operative relationships are clearly capable of producing an enhanced social perception of risk, because the perceived risks of regulatory capture and of lax enforcement amplify the perceived environmental risk to the community. The informal style of enforcement, therefore, by inciting public concern, necessitates a degree of responsiveness to public concern. Whilst this responsiveness was understood by some interviewees to be detracting from the aim of environmental protection in order to satisfy 'emotive', 'irrational' beliefs, we can see that by adopting this broader formula of 'risk', these 'irrational' fears can be viewed as an entirely rational response to the traditional informal approach to

⁶¹ See HC Hansard March 16 1972, Tam Dalyell (Labour MP), col. 908-916, and particularly at 913 where he suggests that "*flexible officials sometimes put public health and safety at risk rather than jeopardise relationships with polluters.*" M. Frankel, *Social Audit - A Special Report: The Alkali Inspectorate*. (Social Audit Ltd, London, 1974).

⁶² T. O'Riordan, & A. Weale, "Administrative Reorganisation Policy Change: The Case of HMIP." (1989) 67 *Public Administration*. 277, at 283.

⁶³ Royal Commission on Environmental Pollution. *Setting Environmental Standards*. (1998) 21st Report. Cmnd 4053, at 8.19.

⁶⁴ House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484, at 235.

environmental enforcement in the UK.⁶⁵ Support for this broad notion of risk can be taken from the apparently blanket mistrust of the nuclear industry and of radioactivity:

In (Radioactive Substances Regulation) there is a constant public perception of harm which is usually ill-founded...and based on information which is massaged to increase fear."⁶⁶

The public psyche does not distinguish between low level and high level radioactive wastes, although obviously scientific risk assessments require distinct levels of protection. Whilst scientific research has supported shallow disposal or marine deposit of wastes of low and intermediate levels of radioactivity, public and political pressures led to their abandonment as a matter of policy in the UK, and a deferral of disposal for 50 years until further research into disposal methods had been conducted.⁶⁷ There will always be a strong driver of public perception in any action taken by the Agency in this field of regulation as the public expects a very high level of enforcement in the nuclear industry. Could this seemingly indiscriminate perception of risk directed at all things nuclear, have arisen from the public's experience of the culture of secrecy which has surrounded this industry and its regulation for the last 30 years?⁶⁸

4.5.4 The 'Optimal Deterrence' Argument

It can also be argued that selective responsiveness to public expectation can serve to maximise the effectiveness of the prosecution process. In chapter one, the statement was made that it is an integral part of a regulator's function to adopt an enforcement style which will facilitate not only compliance but environmental awareness.⁶⁹ In the context of pollution control this need relates to the urgency of stemming unnecessary consumption and exploitation of natural resources. The Agency as a protagonist of changes in attitude towards environmental damage seeks judicial acknowledgement of the seriousness of industry's misconduct, in the hope of attracting wider public attention (perhaps via the media), and thereby reinforcing

⁶⁵ It is not submitted here that nothing has changed since studies such as Frankel's and Bugler's were completed, but that essentially the style of regulation adopted by the Environment Agency is one founded on co-operation - the preference for informal enforcement mechanisms such as persuasion and education rather than formal court action.

⁶⁶ Environment Agency interviewee, June 1998.

⁶⁷ S. Tromans, *Best Practicable Environmental Option: A New Jerusalem?* (United Kingdom Environmental Law Association, London, 1992), at p.96, and 101-102.

⁶⁸ This secrecy is at the industry's own admission, see; "The Experiment Ends But Dounreay Lives On." *The Independent*, (1998) June 6th, p.12.

⁶⁹ C. Wells, *Corporations and Criminal Responsibility*. (Clarendon, Oxford, 1993), at p.16.

social condemnation of environmental crimes.⁷⁰ It can, therefore, be beneficial to keep one eye on public expectations to assist appraisal of which cases to prosecute, as these cases are likely to have public support from the outset. Magistrates, being recruited from the local population, are members of the public too. Where public feeling is high, the prosecution is likely to attract the support of the bench, thereby maximising the likelihood that the outcome will be a conviction and a substantial penalty.

In contrast, a dismissal of a prosecution by the bench can be very damaging. There is substantial evidence of lower courts expressing disapproval of regulatory offences being brought to court at all.⁷¹ As one judge in a recent water pollution prosecution put it:

*A criminal prosecution is, in my view, a very blunt instrument for ensuring that the best standards are maintained by those that have responsibility for these things.*⁷²

In dealing with charges against a waste management offender in the West Midlands, one judge awarding a conditional discharge referred to the defendant scrap metal dealer as, '*eking out a living selling scrap*'.⁷³ The inference here was clearly that the prosecution were wasting the court's time with such trivial cases. Such cases injure morale and the reputation of the Agency as a successful enforcer. It can therefore be of great importance that environmental prosecutions should be facilitated not only by the legal machinery of the regulatory regime, but by public support in order that the resource intensive exercise of court action yields maximum returns in the form of value reinforcement, publicity and deterrence.

The regulatory population also make the connection between public reporting of an incident and the likelihood that the Agency will prosecute. In the course of this research it was discovered that operators will attempt to pre-empt this response by reporting incidents even when there is no legal obligation to:

"I speak to our Inspector every few weeks on the phone to let him know what's going on at the site....We know this is a very high

⁷⁰ R. Quinney, *The Social Reality of Crime*. (Little, Brown, Boston, 1970).

⁷¹ See, in the context of consumer protection offences, H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293p.293.

⁷² Bullimore J in *R v NRA ex rel Harwood* discussed in *Environmental Law & Management* (1996) p.184.

⁷³ Environment Agency Prosecution memo, West Midlands 1996.

profile plant and it's better that he hears from us what's going on, than from a member of the public."⁷⁴

The practice of self-reporting is developing in other sectors (where there is no legal duty to report) because of a popular belief that an early admission will assist the operator in the negotiation of the Agency's enforcement response. By way of illustration, a compliance manager from a water company commented:

*"Our discharge consent does not require us to report incidents, but we have standing instructions to report to the Agency. It is better to do that than to wait for them to come to us. They are less likely to prosecute if they found out from us. The view of top management here is to tell the Agency."*⁷⁵

The manager's association of self-reporting with reducing the likelihood of prosecution is supported by the Agency's published enforcement policies which have, in the past, mentioned 'co-operation by the defendant' as a factor weighing against taking a prosecution.⁷⁶ In the Agency's 1998 policy, a more generalised reference to 'attitude of the offender' is included as a relevant consideration in deciding whether to prosecute.⁷⁷

Thus, the role of the public in increasing the likelihood of prosecution has a beneficial impact on environmental protection, ensuring increasingly prompt reporting of incidents to the Agency.

⁷⁴ Interviewee from industry, May 1998.

⁷⁵ Interviewee August 1998.

⁷⁶ Environment Agency. *Draft Prosecution Policy* (reproduced in Appendices) September 1996 (reproduced in Appendix D) September 1996.

⁷⁷ The Environment Agency. *Enforcement and Prosecution Policy*. November 1998., at 22.

4.6 Comment & Conclusion

The findings of this chapter confirm the continued relevance of public feeling as a driver of enforcement. The legal and policy framework of environmental protection gives few clues as to the importance to be attached to public perceptions of risk, and public expectation as a driver of enforcement style. The Agency's own policies, however, demonstrate a commitment to accountable and transparent regulation which indicates that it contemplates a degree of responsiveness to public feeling (although there is no indication of how this role relates to its function of protecting the environment according to scientifically proven risks). The Agency's enforcement priorities appear to have been captured to a degree by what the public categorises as worthy of prosecution. Practice appears to indicate, however, that a sensible balance is currently being operated in the Agency, whereby a public commotion *can* tip the balance in favour of prosecution, and therefore response to public feeling generally operates to drive increased resort to prosecution. This approach is to be applauded, for whilst dancing to the tune of the current hysteria can distract the Agency from the priority of environmental protection, the compliance-based approach to enforcement prominent in all sectors of the Agency, founded as it is on trust between operator and industry, must be balanced by sensitivity to public expectations if it is to secure public confidence.

Hawkins' model did not engage in any critical assessment of the impact of public feeling on enforcement, but merely remarked that acting on the basis of public feeling was not regarded as legitimate regulatory behaviour.⁷⁸ It has been argued here that such impact is entirely consistent with the Agency's statutory duty of environmental protection and, indeed, is a necessity if the Agency is to maintain public confidence. The principal objections to permitting public feeling to play a part in decisions about enforcement do not stand up to analysis, but merely serve to warn against the dangers of enforcement being driven exclusively by public outrage. Certainly, pollution control ought not to be dictated by 'how many people will be frightened rather than how many people will be killed,'⁷⁹ but regulating in a social vacuum solely according to scientific predictions of risk is also fraught with difficulties. A regulator which does not respond to public opinion has more than its reputation at stake:

⁷⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), at 195 and mentioned at the end of 4.4.

⁷⁹ B. Wynne, *Risk Management and Hazardous Waste: Implementation and the Dialectic of Credibility*. (Springer-Verlag, Berlin, 1987) at p.357.

*"We are, after all, public servants. If we are seen by society at large to be sensitive to their fears and concerns...we will have the backing of public pressure behind our priorities and objectives. Conversely, withdrawal of public support and confidence can throw any regulatory body into turmoil and mean that its resources are constantly diverted and distracted in non-productive defensive actions."*⁸⁰

Hawkins' notion of regulatory ambivalence referred not only to the regulator's struggle to balance the demands of operators and public feeling but also to the lack of moral consensus underpinning the offences that the regulator must police. Whereas the need to respond to public feeling (political ambivalence) has been seen to generally increase the likelihood of prosecutions, the next chapter will explore the capacity of moral ambivalence to inhibit the use of prosecution.

⁸⁰ M. Davies, (Health & Safety Executive) "The Prosecution Process - The Manager's Perspective." Paper presented at the Prosecution by Regulatory Bodies Conference, September 1998, University of Oxford.



Chapter 5

THE DRIVER OF MORAL AMBIVALENCE

"...[moral] ambivalence poses the crucial problem of enforcement for regulatory agencies and their field staffs, because their authority is not secured on a perceived moral and political consensus about the ills they seek to control."

(K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), pp.12-13).



CHAPTER 5

THE DRIVER OF MORAL AMBIVALENCE

"To the environmentalists, what is at risk is the very possibility of leading a good life. To the industrialists, what is at risk is the very possibility of leading a good life. The debate, it appears, is actually about what constitutes a good life."¹

The need to maintain credibility as a regulator requires not only a visible enforcement response when public concern demands it, but that the prosecution profile of the Agency coincides with the level of opprobrium society attaches to environmental offences generally. This chapter explores the extent to which the moral status of these offences continues to influence Agency enforcement.

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¹ N. Evernden, *The Social Creation of Nature*. (John Hopkins, Baltimore, 1993), p.4.

5.1 Introduction

The moral ambivalence which surrounds the criminalisation of regulatory breach in areas such as environmental and consumer protection and financial services regulation, was, according to Hawkins, another important driver of the enforcement style adopted in these sectors. These infractions were not accorded the same level of disapproval as 'traditional' crimes' such as murder and theft, and, as such, they produced a very different enforcement profile.² Their short history of criminal status, meant that there was only a low level of consensus as to the moral status of acts which were harmful to the environment.³ It seems then that the recency with which society has decided to condemn polluting behaviour as 'criminal' may be, at least in part, responsible for the compliance-based style of enforcement adopted and continued by the Environment Agency.⁴ Paulus, in a study of food regulation, concluded that the process by which 'new' offences became stigmatised was exceedingly slow, as a degree of consensus in society must be given time to develop towards the act constituting the offence.⁵ Consistently with this notion of progressive stigmatisation, the suggestion has been made that a steady shift in public opinion has been taking place:

*"An increasingly attentive public now views pollution with moral opprobrium, rather than as an inevitable consequence of industrial activity."*⁶

Can it be said then that the prerequisite level of consensus has been reached, so that environmental offences truly attract the condemnation of society and that moral ambivalence no longer has a restrictive impact on enforcement? Two mechanisms which play a role in maintaining the uncertain moral status of these offences will be examined briefly here in order to answer this question; the distinct profile of environmental offences and techniques of trivialisation.

² Similarly, see J. Bugler, *Polluting Britain*. (Penguin, London, 1972 who notes that objections to pollution policies which would involve routine resort to the criminal courts are 'founded on an inadequate appreciation of the social wrong of pollution,' *Polluting Britain*. Penguin at p.175.

³ See, for example, A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), at p.79.

⁴ Largely a development of the late nineteenth century, K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), at p.11. Of course there were no waste management offences until the 1970s (see chapter 3).

⁵ I. Paulus, *The Search for Pure Food*. (Martin Robertson, Law In Society Series, London, 1974).

⁶ A. Jordan, "Integrated Pollution Control and the Evolving Style and Structure of Environmental Regulation." (1993) *Environmental Politics*. 2(3) 405, at p.411.

5.1.1 The Distinct Profile of Environmental Offences

Hawkins referred to the unfamiliar structure of regulatory offences as providing a reason for their being distinguishable from true crimes, and for a distinct approach to law enforcement. The perception of court (and sometimes regulatory) personnel that the criminal law content of environmental regulation was somehow misplaced, and that the severity of the law should be mitigated by sensitive enforcement, is understandable in view of the absence of a number of fundamental criminal law concepts in environmental offences.⁷ For example, criminal liability is generally dependent on some '*mens rea*', a mental condition of either reckless or deliberate causing of harm.⁸ Yet, most environmental offences still require no *mens rea*, as such, and can be committed without what most lawyers understand as fault.⁹ In addition, the identifiable 'victim' in traditional crimes, whose suffering excites moral outrage toward the criminal is also absent. The victims of environmental offences of unlawful pollution tend to be the collective citizens who may not even realise their interests have been compromised.¹⁰ Just as the 'victim' is absent, so is the recognisable 'damage.' The majority of environmental offences are inchoate and require no proof that there was as much as an 'interference' with the environment.¹¹ The moral ambivalence surrounding environmental breach can therefore be seen to be maintained in part by the legal fabric of the offences themselves, which is in many ways uncharacteristic of criminal prohibitions generally.

5.1.2 Trivialisation: Techniques for Perpetuating Moral Ambivalence

Another means by which moral ambivalence is maintained can be taken from Croall's conclusions about the way strict liability regulatory offences are processed by the courts.¹² The legal context of Croall's study was consumer protection legislation.¹³ After visiting 50 hearings, she was able to demonstrate that the use of the lower courts as a venue for regulatory offences reinforced a broad assumption

⁷ Although see G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999) at 174 where it is argued that the claim that regulatory crimes are not real crimes is 'powerful, pervasive, but highly misleading.'

⁸ A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994). at p.79 and see generally R.G. Singer, "The Resurgence of Mens Rea - the rise and fall of strict criminal liability." (1989) 30 *Boston College Law Review*. 337.

⁹ See *CPC(UK) v NRA* [1995] (CA) Env LR 131 and *NRA v Empress Car* [1998] 1 All ER 481 (HL).

¹⁰ C. Wells, *Corporations and Criminal Responsibility*. (Clarendon, Oxford, 1993), p.26.

¹¹ For example, in water pollution offences, all that is necessary is that the substance which is the pollutant be held to be capable of causing 'harm,' see *NRA v Egger* (unreported) Newcastle Upon Tyne Crown Court June 1992, reported in Burnett Hall (1995) pp.351-4 and W. Howarth, "Poisonous, Noxious or Polluting: Contrasting Approaches to Environmental Regulation." (1993) 56 *Modern Law Review*. 171.

¹² H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293.

¹³ (Trade descriptions legislation and weights and measures).

that these infringements were trivial. By using strategic mitigation, defendants denied moral blameworthiness on their part, in an attempt to attract the lenience of the court. Typically, they made a virtue out of pleading guilty to a strict liability offence (showing respect for the law and acceptance of responsibility) and then delivered arguments which denied culpability. In this way, the strict liability nature of these statutory provisions served to marginalise the offences. It seems then that those whose misdemeanours are counted as 'regulatory' or 'corporate' offences can expect greater lenience in the administration of the law.¹⁴ Croall's notion of ritual trivialisation in the courtroom¹⁵ demonstrates one of the means by which the driver of moral ambivalence is maintained and perpetuated. The social construction of crime is no doubt important in predetermining the consequence of the offence for the offender. The heavier the moral opprobrium attached to the offence, the greater the penalty which will be imposed by the courts and by society at large, and, therefore, the greater the deterrent.

5.2 A Courtroom Study

This chapter unashamedly borrows inspiration from Croall's study referred to above.¹⁶ In the course of this research, 25 Agency prosecutions were attended, with a view to identifying some of the techniques used by defendants to trivialise their offences in the course of their defence and mitigation arguments.¹⁷ These arguments are discussed with a view to exploring moral ambivalence and the extent to which it remains the case that the moral status of environmental breach is 'less than clear' or is 'morally neutral',¹⁸ and can therefore be said to operate as an inhibiting influence on enforcement.¹⁹

A methodological point that is worth making at this stage is that presentation of the case is undoubtedly 'skewed' on both sides for the benefit of the bench. The choice

¹⁴ There are many works which support the view that the lower class has a greater risk of officially being defined as criminal, R. Quinney, *The Social Reality of Crime*. (Boston, Little Brown, 1970), at p.218, E. Sutherland, "Is White Collar Crime, Crime?" (1945) *American Sociological Review*. pp.132-139, P. Yeager, *The Limits of Law: The Public Regulation of Private Pollution*. (Cambridge University Press, Cambridge, 1991), p.7.

¹⁵ See also D.J. McBarnet, 'Conviction: Law, the State and the Construction of Justice.' (Macmillan, London, 1981) for arguments that cases in the lower courts are trivialised.

¹⁶ H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293. The decision to attend these prosecutions was initially taken in order to form contacts and an understanding of the prosecution process, but it provided a wealth of information on the continued trivialisation of environmental offences.

¹⁷ The details of these cases are on file with the researcher. The broad nature of the cases is detailed at Appendix C. Some general methodological points arising out of this study are detailed at 11.3.

¹⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984), pp.xii and 10 respectively.

¹⁹*Ibid.*, p.11.

of terminology and style of mitigation demonstrates what the legal profession and its clients have concluded are most likely to influence the bench. They may be unconvinced themselves by the sentiment of their assertions, but nevertheless believe in the persuasive value of the argument. Such arguments are, therefore, clearly important in analysis of the moral ambivalence associated with these offences, for they are designed to refute and neutralise the criminalisation of the defendant's activities. As the majority of these cases fall to be dealt with by the Magistrates' and Crown Courts, written transcripts of judgments are exceedingly rare. It is, therefore, impossible to gauge with any certainty the degree to which various mitigation arguments are successful in minimising sentence. Nevertheless, this research remains significant in highlighting the potential for defence counsel to exploit the moral ambivalence surrounding environmental offences.

5.3 Perpetuating Moral Ambivalence: Administrative Trivialisation

Croall reported that trivialisation was evident in the administrative treatment of consumer protection prosecutions. Court personnel perceived these cases as 'uninteresting,' confining them to small courtrooms with little in the way of a public gallery, and expressing surprise that anyone should be interested in viewing the proceedings. Certainly, Agency defendants were not placed alongside police defendants in court listings. Magistrates' Court time/allocation was divided into police prosecutions and non-police prosecutions. One usher described this separation as of 'criminal prosecutions' and 'private prosecutions,' and court clerks expressed disappointment when cases involving inert waste were brought, preferring, '*something interesting that glows in the dark.*'²⁰

5.4 Perpetuating Moral Ambivalence: Strategies of Mitigation

Arguments used by defence counsel which tended to trivialise the defendant's breach are discussed here under four sections; firstly, those where the defendant denied fault or tried to deflect responsibility to another party, secondly, arguments which attempted to assert that the breach had resulted in minimal environmental impact or none at all, thirdly mitigation which sought to distort the monitoring data associated with the offence and finally, arguments which otherwise raised the implication that prosecution was somehow 'inappropriate.'

²⁰ Preston Crown Court.

5.4.1 Denial of Culpability: Misfortune & Third Parties

The majority of environmental offences do not require the prosecution to show that the defendant acted negligently or wilfully. This cloak of strict liability proves highly useful to many defendants, for as the prosecutor is not required to prove 'fault', this leaves the defence counsel plenty of room to deny culpability in order to attract the sympathy of the bench. The defendants who adopted this strategy chose to either blame misfortune or third parties for the offence.

Whilst accepting the strict liability nature of many of the offences, defence counsel would often seek the court's sympathy by describing the incident as '*accidental*' and therefore unavoidable, a '*fact of life*' or an offence which '*goes on all the time*.' Counsel defending a detergent spillage²¹ emphasised the absence of a concrete explanation for the incident. Both the Agency and the factory involved had found it hard to explain how the spillage had occurred, but it was suggested that: a pump had started working in the middle of the night on its own; a high level switch which would turn off the pump when detergent reached a critical level, had failed to operate; and the incident occurred late at night which meant the pump had been operating for two hours before the spillage was discovered. The defence labelled these 'facts,' an '*inexplicable occurrence*', and an '*unfortunate series of coincidences*.' Two other defence counsel noted the misfortune arising out of the coincidence of their clients' pollution and the Agency's routine inspection of the river he had polluted, on the same date!²² A solvents manufacturing company asserted that the explosive release of pollutant could not have occurred but for the simultaneous over-pressurisation of the defendant's pipeline and an ill-fitting seal. A number of defendants made much of the fact that a release from their site had occurred at night, at the weekend, or on a '*Bank Holiday Sunday*.'

Rather than highlight the improbability of the incident, other defendants excused themselves by pointing to the fact that the Agency had not specifically instructed them on how to prevent the incident. In an IPC prosecution, the defence attempted to refute that the pollution incident which had occurred was foreseeable; "*There is no industry standard requiring an alarm at this point in the process. There was no breach of an industry standard.*" The judge was clearly unmoved and indicated that the degree of foreseeability required could extend far beyond common practices:

²¹ Rochdale Magistrates' Court.

²² Knowsley Magistrates' Court.

*"...[I]f there had been a meeting in which the possibility of such an alarm had been discussed, the conclusion would probably have been [that] it should have been installed - a great degree of foresight is necessary."*²³

Defence counsel's regular insistence on 'inevitability' or 'unavoidable accident' as the explanation for their offence can be usefully contrasted with the views of Agency officers. The survey of Agency officers discussed in chapter 3²⁴ showed officers ranked inevitability/unavoidability very low as a cause of environmental breach (14%). By far the more frequent explanations in the officers' perceptions were incompetence (39%) and profit-seeking (38%). In contrast, the defendants in court in all sectors frequently attempted to persuade the courts of the coincidental and accidental nature of spillages for which they were being prosecuted.²⁵ Anecdotes of 'accidental' incidents offered by officers in interview tended to relate to malicious conduct by third parties such as disgruntled employees or workers who trigger an incident in the hope of getting more over-time remuneration, or were attributed to freak weather conditions:

*"A farmer spread slurry in the winter - it was a sunny day and from nowhere came a tremendous thunderstorm. He couldn't possibly have foreseen it. He was given a warning - 'don't do this again' - which was the mildest rebuke possible..."*²⁶

The definitions of 'accidental' used by defendants regulated by all three sectors of pollution control, tended to be much broader, encompassing an absence of a full explanation of the events which led up to a pollution incident, failure of plant or safety equipment, incidents occurring at night or otherwise during low staffing levels, and incidents with a cause which was not attributable to a breach of licence conditions. These observations tend to suggest that site and management failures are being masked as morally neutral misfortune.

Whilst accepting legal liability, many defendants sought to deflect moral responsibility for the incident to a third party. In a prosecution of an unlicensed waste transfer station, the defendants relied in mitigation on the fact that for eighteen months of their unlicensed activities, the Agency had dealt solely with

²³ Warrington Crown Court. Discussed at P. De Prez, "Environment Agency v ICI Chemicals & Polymers." (1998) 10(4) *Environmental Law & Management* 187.

²⁴ Question B2.

²⁵ See Appendix C for details of the court cases attended during this research.

²⁶ Water Quality officer, November 1997.

their director, who had now retired.²⁷ The intended inference here²⁸ was that the cause of the problem was now gone, therefore it was inappropriate to punish the defendants as an organisation.²⁹ This defendant can be seen to capitalise on the relative absence of conceptualisations of collective fault in our law.³⁰ The acts of the corporate defendant must be identified with those of its employees, whether past or present. The argument outlined above clearly makes a mockery of corporate responsibility and seeks to undermine judicial sentiment that corporate responsibility extends to its employees' acts of pollution because of the company's capacity to educate and control:

*"...[T]o make an offence an effective weapon in the defence of environmental protection, a company must by necessary implication be criminally liable for the acts or omissions of its servants or agents during activities being done for the company."*³¹

When it appeared that the intervening 'act of another' had become an accepted defence against water pollution charges,³² this became a popular theme to attempt avoidance of liability. In a waste management prosecution from the West Midlands, the flytipping of eight drums of cellulose thinners had been traced back to the defendants' site. They pleaded not guilty on the grounds that their drums had been stolen. This defence failed as there were no police reports consistent with this claim.³³ The need to substantiate claims of third party interference has led to the role of the *novus actus* principle diminishing as a formal defence.³⁴ The result is that 'fault of another' is frequently raised as a mitigation argument. One prosecuted pollution incident was suspected to have arisen by the 'accidental' spillage of detergent which would normally have drained into the foul sewer. Instead the detergent had found its way to a rodding hole which had been left open. This hole, intended only to carry roof water, led straight to the river. The defence blamed the

²⁷ This type of argument is common, also used in mitigation in a recent prosecution against *British Nuclear Fuels Limited* for six years' failure to repair a bridge carrying radioactive waste pipeline. See further on this, *The Guardian*, 'BNFL fined £20,000 for disregarding safety,' 5th April 1997, p.6.

²⁸ As understood by the researcher and as commented upon by a WRO present at the court.

²⁹ The defendant was fined £4,000 for its three years of operation without a licence.

³⁰ C. Wells, *Corporations and Criminal Responsibility*. (Clarendon, Oxford, 1993), at p.62. See generally on the concept of corporate responsibility, B. Fisse, "Recent Developments in Corporate Criminal Law and Corporate Liability" (1990) 13 *University of New South Wales Law Journal*. 1, C.M.V. Clarkson, "Kicking Corporate Bodies and Damning their Souls." (1996) 59(4) *Modern Law Review* 557, and M. Levi, "Business Regulatory Offences and the Criminal Law." (1984) *Company Lawyer*. 251.

³¹ *Morland J in NRA v Alfred McAlpine QBD [1994] 4 All ER 286, at p.300.*

³² *Impress (Worcester) v Rees* (1971) 2 All ER 357.

³³ Prosecution Memo: West Midlands Upper Trent Area - prosecution date 6.12.96.

³⁴ *NRA v Empress Car [1998] 1 All ER 481 (HL)*. Now intervention of a third party must be extraordinary to negate liability.

site's architects for the proximity of the rodding hole to the foul sewer drain. Despite clear authority to the contrary,³⁵ the defendants tried to imply that the responsibility of another meant that they could not also be held responsible.³⁶

One waste management company was prosecuted when a violet plume was discharged from the defendant's high temperature incinerator. The defendants, who disposed of waste from a range of pharmaceutical clients, refuted responsibility for the incident on the basis that:

"...[T]he technology does not exist for full analysis of the drums for every constituent. Sadly, we must rely on industry and the customer - they should know best what's in their waste."

Another waste management defendant who had accumulated excavation waste, mattresses, asbestos, putrescible wastes and other wastes on his land (some ten feet high and close to a watercourse), sought to cast doubt on his personal responsibility by saying the accumulation was out of his control. Because of its position, the land was '*vulnerable to flytippers*,' and it was alleged that passers-by had thrown mattresses onto the field and drivers allowed onto the land had dumped unwanted materials there, although no evidence was offered to this effect. This style of mitigation tends to undermine the courts' rulings that the concurrent responsibility of 'others' or the intervention of 'others' do not lessen the offence.³⁷

Despite the popularity of denying culpability as a ground of mitigation, there is evidence to suggest that the courts are developing a resilience to the notion that environmental breaches are often accidental or inevitable. Past judicial rationalisations of strict liability offences have tended to emphasise the need for 'efficient enforcement.'³⁸ The rigidity of these strict liability provisions alleviates the burden of the prosecution from having to prove negligence or fault on the part of the operator, an impossible task given that the relevant evidence is generally under the exclusive control of the operator behind the site boundary.³⁹ The rhetoric of efficient enforcement has sometimes been accompanied by the view that

³⁵ *NRA v Wright Engineering* [1994] 4 All ER 281.

³⁶ St Helens' Magistrates' Court.

³⁷ See *CPC(UK) v NRA* [1994], *NRA v Yorkshire Water Services* [1994] 3 WLR 1202 and, more recently, *Environment Agency v Brock Plc* [1998] JPL 968 (QBD).

³⁸ See Singer's discussion of *R v Woodrow* 14 M & W 404, 153 Eng Rep 907, at R.G. Singer, "The Resurgence of Mens Rea - the rise and fall of strict criminal liability." (1989) 30 *Boston College Law Review*. 337.

³⁹ A consideration mentioned in G. Richardson, "Strict Liability for Regulatory Crime: the Empirical Research." (1987) *Criminal Law Review*. 295, at p.303.

environmental protection was so important as to trump considerations of criminal justice.⁴⁰ There is now, however, a perceptible shift in *NRA v Empress Car*⁴¹ from efficient enforcement to the rhetoric of the 'duty' imposed by these provisions. The rhetoric of 'duty' entails that the defendant who is not 'negligent' has nevertheless 'failed' to prevent the incident and is in breach of a legal obligation. Under this rhetoric, the offender is no longer a victim of draconian provisions designed to ensure the prevalence of environmental protection, but is portrayed as culpable and deserving of reprimand. This form of culpability is not one of 'negligence,' in which the benchmark of the reasonable man is often defined by reference to a common practice,⁴² but represents a higher standard defined by a failure to achieve best practice. It seems then that the higher courts at least are developing a resilience to argument which tends to deny moral responsibility for the polluting event and that criminalisation has produced a shift in the social construction of environmental offences, from infringements of prosecutor-friendly legislation towards breach of environmental 'duty'.⁴³

5.4.2 No or Minimal Environmental Impact

Environmental offences are generally 'inchoate', that is, conviction does not require proof of harm caused by the offence. The offences merely contemplate the possibility or risk of harm:

*"One looks at the nature of the discharge and one says, is that discharge capable of causing harm to a river, in the sense of causing damage to uses to which a river might be put; damage to animal, vegetable or other... or damaging that river aesthetically?"*⁴⁴

Although no defence can be made of the fact that 'harm' is minimal, this proved to be a popular style of mitigation. In a prosecution for an unconsented 46-hour discharge of raw sewage to a brook caused by a blocked sewer, defence counsel questioned the common perceptions of sewage content as 'what is flushed away',

⁴⁰ *Alphacell v Woodward* [1972] 2 All ER 475 at 491, and *NRA v Alfred McAlpine* [1994] 4 All ER 286 at p.300.

⁴¹ *NRA v Empress Car* [1998] 1 All ER 481 (HL) at p.489.

⁴² Failure to follow common practice makes it more difficult for a civil defendant to show he was not negligent; *Morton v William Dixon* (1909) SC 807; *Morris v West Hartlepool Steam Navigation Co. Ltd* [1956] AC 552.

⁴³ The rhetoric of 'rights' and 'duties' in the context of environmental protection is prevalent in the dialogue of human rights and the environment. See for example, the 1994 Draft Declaration of Principles on Human Rights and the Environment, particularly paras 5 and 21.

⁴⁴ Bryant J in *NRA v Egger* (1992) Newcastle Upon Tyne, Crown Court, reported at Burnett Hall (1995) pp.351-4.

explaining that in fact it included much clean water from 'washing machines, sinks and rain water.' Views between prosecuting and defence counsel of course invariably differed on the issue of the measure of hazard presented by a given release. The test of ingestion was frequently used to demonstrate the inert nature of the substance released unlawfully; "*didrazoic acid is a radiographic agent and is drunk prior to x-ray.*" In one water pollution case, defence counsel repeatedly emphasised that the pollutant, maize starch, was '*an edible product not a toxic substance.*' They relied on a statement that maize starch could cause no hazard to human health when in water,⁴⁵ and suggested it could not be compared to 'toxic' substances such as oil and manure. This preoccupation with public health implications and man's resistance to the contaminant aims to distract the court from the true scope of environmental regulation which embraces the release of substances which could potentially interfere with *any* living organism or ecosystem.⁴⁶

It was also common to refer to background pollution already present in the environment in order to distort the impact of the incident before the court. A particularly incisive argument to this effect, sought to undermine the need for regulation of the release of trichloroethylene,⁴⁷ and *persuade the court to reflect this* in their sentencing. It was shown that the substance, several tonnes of which had been released to the atmosphere from the plant in which it was manufactured, would evaporate in any case in the course of normal use by its consumer. Therefore, ultimately, the total volume of the substance authorised by the Agency to be produced at the site, was destined to evaporate in any case to the atmosphere. How serious then could this incident be, if the total 250,000 tonnes the defendant produced at the site was anticipated as ultimately evaporating to the environment without producing harm?⁴⁸ This argument, of course, seeks to distract the court from the Agency's concern which related to the *concentrations* released during the incident.

Further remarks of a trivialising nature were made outside the court room. A defendant prosecuted for unauthorised burning of waste sought to express his objections by getting an Agency witness reprimanded by the court clerk for smoking in the waiting area. His complaint was that the smoker was '*polluting*' the air with his '*toxic substances*' and should be appearing in the dock alongside him to answer to the court for his '*crime.*' Although these comments were clearly not

⁴⁵ Knowsley Magistrates' Court.

⁴⁶ Ss.1(3) & 1(4) EPA 1990.

⁴⁷ A solvent often used for degreasing fabricated metal parts.

⁴⁸ Widnes Magistrates' Court.

intended for the ears of the bench, this anecdote is a clear demonstration of the moral ambivalence with which pollution offences are still treated.

5.4.3 Environmental Significance of Scientific Evidence: Contortions and Semantics

While the fact of pollution in law could often not be disputed by the defendant, a great deal was made of the 'significance' of the pollution and therefore the seriousness of the offence. The court was frequently asked to choose between two contrasting interpretations. In the words of one High Court judge:

*"Sewage remains sewage notwithstanding that the water authorities treat it so as to turn it into potable water. The argument at times reminded me of those black and white lithographs of Escher which depict fishes or swallows depending on whether one is concentrating on the black or the white. Some would say the picture was of fishes; others would say it was of swallows. The right answer is that it is both fishes and swallows."*⁴⁹

Some frustration is felt by Agency officers that the magistrates often do not understand the complex issues being argued or the significance of a particular incident.⁵⁰ In one Crown Court case, the judge showed signs of his own frustration, admitting that he found the geological evidence presented by the prosecution 'somewhat difficult.'⁵¹ In most cases the Agency's legal representative made clear attempts to present the facts or measurements such as 'biochemical oxygen demand' (BOD), 'parts per million' (PPM) and 'suspended solids,' in a way which the court would understand; for example:

*"1.2 billion cubic litres of water would be needed to dilute this substance to drinking water quality. In other words four times the capacity of Lake Ullswater in the Lake District."*⁵²

and then again:

*"It is useful to consider the dilution ratio. 84,000 litres were lost to water. It would require half a million Olympic swimming pools of water to dilute it to drinking water standard."*⁵³

⁴⁹ *R v Rotherham MBC & Safety Kleen UK Ltd ex parte William Rankin* (1990) *Journal of Environmental Law* 250, at p.254.

⁵⁰ In civil cases involving scientific/technical matters, the case may be heard in the Official Referee's Court (a specialist panel forming part of the High Court).

⁵¹ Warrington Crown Court. This case is discussed in more detail at P. De Prez, "Environment Agency v ICI Chemicals & Polymers." (1998) 10(4) *Environmental Law & Management* 187.

⁵² Widnes Magistrates' Court.

In an IPC prosecution, the Agency solicitor described the loss of 56 tonnes of trichloroethylene, a substance toxic by inhalation, as an amount which equated to the volume of 4,200 household buckets. The defence counsel snorted that this analogy was '*absurd*,' despite the fact that this phraseology had been 'borrowed' from previous proceedings in which the same solicitor had trivialised the level of an earlier spill as amounting to only '*two and a half bucketfuls*.' The formal reply of the defence was that the substance was; '*not flammable, not carcinogenic, not harmful to the unborn child, and of low toxicity*.' He later went on to compare a previously decided case involving a similar volume of oil being discharged to the River Tees, the fine for that case being £2,000, '*even though that was oil!*' This appears to be an attempt to capitalise on the public's distorted perception of oil discharges,⁵⁴ which in fact present relatively low environmental risks compared to trichloroethylene.

The Agency sought to counteract such forms of mitigation by offering photographic evidence to the court wherever possible and, in recognition of the potency of visual aids, provided photographs of similar incidents where none were available from the incident itself. The disputes concerning interpretation of scientific evidence often resulted in the defendant 'blinding the court with science.' Many defendants would convert Agency evidence into different modes of measurement intended to appear smaller and less significant. In an IPC prosecution, the Agency described levels of chlorinated hydrocarbons in an underground pit as having reached eighteen times the permitted level. The defence responded by arguing that the amount actually discharged into the canal from the pit was 0.5% of that which the Agency permitted the defendant to discharge per year, or alternatively, '*two and a half bucketfuls*.' An indignant waste management defendant compared the single incident which it had been prosecuted for with its entire operating history of incinerating more than one million drums of waste, and patted itself on the back for what it described as a '*99.9998% effectiveness rate*.' In a separate water pollution prosecution, defendant counsel in an attempt to diminish the importance of the incident retorted to an Agency witness; '*You call it controlled water, I call it a ditch*.'⁵⁵ He later referred to the prosecution's case as '*a rather desperate attempt to make a ditch a watercourse*.' This prosecution was unsuccessful.

⁵³ Evernden remarks that; "Being able to determine 'parts per billion' of a contaminant enables the environmentalist to argue that pollution has indeed occurred, and thus to infer that the entire position of the polluter is untenable..." N. Evernden, *The Social Creation of Nature*. (John Hopkins, Baltimore, 1993), p.7.

⁵⁴ See 4.2.2.

⁵⁵ Chester Magistrates Court. The decision in this case was overturned on appeal by the Agency. See *Environment Agency v Brock Plc* [1998] JPL 968 (QBD).

Evidence on the purported severity of the incident is always conflicting and undoubtedly confuses the court. It is impossible to gauge precisely the impact this negotiation of the 'severity' of the case has on the court's assessment on the appropriate penalty. The generally low levels of fines in environmental prosecutions⁵⁶ suggests certainly that these offences are being trivialised, and these forms of mitigation are likely to be a contributing factor in the social construction of 'severity' within the court room. The evidence set out above suggests that, although the moral ambivalence relating to environmental offences is perhaps diminishing, these offences remain extremely vulnerable to trivialisation in the courtroom.

5.5 Challenging the Propriety of the Decision to Prosecute

The trivialisation strategies described above make direct use of the 'compromises' in the legal fabric of the offences prosecuted. In addition to these methods of trivialisation, a further strategy of mitigation demonstrates an attempt to capitalise on an assumption that prosecution of these offences requires justification. This strategy of mitigation took the form of generalised attacks of the Agency's 'over-rigorous approach' to enforcement. A local authority prosecuted for a substantial sewage discharge to controlled waters, argued that the prosecution was 'unfair'.⁵⁷ They had after all, only recently seen an Agency spokesperson in the media saying that the Agency liked to work with companies and that prosecution was a last resort.⁵⁸ Counsel defending a local Borough Council from prosecution, implied there was something distasteful about the '*unhappy task of mitigating for a public authority prosecuted by another public authority*',⁵⁹ and implied that the prosecution would not have been taken by the Agency's less adversarial predecessors.

Some defendants made allegations of aggressive conduct by the Agency in its dealings with the defendant. One waste management defendant claimed Agency officers approached him saying: "*I have more power than the police, customs & excise and the tax man...*", that they had used a camera flash in his face and that one of them had been '*on a power trip...[and was] showing the other officers how*

⁵⁶See chapter 8.

⁵⁷ Stockport Magistrates' Court.

⁵⁸ Similarly, in *Environment Agency v Stanford* [1999] Env LR 286 QBD, the defendant also relied on Agency policy of resolving matters without recourse to the courts to argue that the prosecution was an abuse of process, at 295.

⁵⁹ Northwich Magistrates' Court.

he did things."⁶⁰ Another blatant comment on enforcement practice was by a prosecuted local authority charged with keeping and depositing controlled waste without a licence. In mitigation, counsel stated that when the offence had first been committed three years ago, the relevant enforcement body was the WRA, the local County Council. Their approach was the '*old style*', the '*old school*', of '*let's sort this out.*' This approach had now been '*superseded by the Environment Agency.*'⁶¹ These words heavily implied that the Agency adopted more confrontational enforcement tactics than its predecessors and that the defendants had been 'caught out' by a change in regulatory style. In a similar vein, a water pollution defendant argued that he had received many visits from '*the environmental people,*' who had given him no instructions to improve his site conditions. (His argument was not entirely convincing as he only referred to the Health and Safety Executive and the local authority, and not the Agency itself).

A process industries operator accused the Agency of '*over egging the pudding,*' by issuing four summonses for separate breaches of authorisation conditions, although arising from a single incident.⁶² Another IPC defendant also used Agency enforcement practice as a mitigation plea.⁶³ Their claim was that although the charges brought included breach of authorisations, the Agency was not in the habit of prosecuting unless there was a pollution incident. Therefore, to penalise these breaches of authorisation as well as the charge for the pollution incident was 'unfair.' Many companies fortunate enough to have breached their authorisations without polluting, would not be brought before the court, and would therefore not be penalised for their breach.⁶⁴

⁶⁰ Lancaster Magistrates' Court.

⁶¹ All counsel's words.

⁶² The pollution whilst originating from a single release, had three destinations; a release to atmosphere, release to a canal and the remainder seeping into the ground. Multiple charges were likely to be the Agency's concerted effort to maximise sentence.

⁶³ Widnes Magistrates' Court. For further detail on this case, see P. De Prez, "Technical Offences and Environment Agency Enforcement Practice." (1997) 9(6) *Environmental Law & Management*. 261.

⁶⁴ The justices in this instance were apparently not persuaded by this argument, handing down a heavier penalty for the charges for breach of authorisation than for the pollution offence itself. It is well established that it is not for the court to query why an offence has not been prosecuted in previous cases (see *Arrowsmith v Jenkins* [1963] 2QB 561).

5.6 Moral Ambivalence: Undermining Environmental Protection?

Gunningham acknowledged the symbiotic relationship between the criminal law and public opinion:

*"The criminal law both reflects existing public sentiments about the heinousness of certain activities, but can also be used to shape such perceptions."*⁶⁵

Thus, at least for the Agency, it is not only the individual offender's fate that is at stake in any prosecution, but the strength of public sentiment regarding environmental offences. The trivialisation of environmental breach is potentially damaging to the ideological role of the criminal prosecution. It is submitted that, although no conclusive evidence is presented here, trivialisation is an effective means of maintaining frail and insubstantial penalties. The continued low levels of penalties in environmental prosecutions (explored in more detail in chapter 8) provides strong circumstantial evidence that trivialisation strategies are effective. The persuasiveness of defence counsel's arguments can only be enhanced by the fact that the magistrates are simply not used to dealing with corporate offenders, but individuals.

Techniques of trivialisation serve to mask the seriousness of the offence⁶⁶ and hinder the process of stigmatisation. Trivialisation therefore has a restrictive effect on the style of enforcement that the public, the courts and operators will find acceptable. In order to maintain the appearance of a credible enforcer, the Agency must appear to have the court's support, and must, therefore, generally only take prosecutions in cases that it believes the courts will respond positively to:

*"An agency responsible for the enforcement of strict liability offences is particularly vulnerable to charges of over-interference and persecution and thus the agency must choose its prosecutions with care."*⁶⁷

Indeed, in its draft prosecution policy, the Agency explicitly referred to the likelihood that the court would only impose a nominal penalty, as a factor weighing

⁶⁵ N. Gunningham. *Regulating Workplace Safety: System & Sanctions* (Oxford University Press, Oxford, 1999), p.194.

⁶⁶ H. Croall, "Mistakes, Accidents and Someone Else's Fault." (1988) *Journal of Law & Society* 293, at 293.

⁶⁷ G. Richardson, "Strict Liability for Regulatory Crime: the Empirical Research." (1987) *Criminal Law Review*. 295, p.301.

against the taking of a prosecution.⁶⁸ Although Hawkins' portrayal of regulators is one of their being powerless to affect their own destiny⁶⁹ the symbiotic relationship of criminal law with public sentiment suggests that the Agency does have the capacity to further increase condemnation of environmental offences (and therefore its own credibility) by both careful selection of cases and by the use of arguments anticipating and counteracting defendants' attempts to trivialise environmental offences.

If environmental legislation and technology are to continue becoming increasingly complex, perhaps now is the time for serious consideration of an environmental division of the High Court, as recommended in 1994 by the Labour Party Policy Commission⁷⁰ or an Environmental Court as advocated in the recent Grant Report.⁷¹ Such courts with a specialist bench would be better equipped to deal with the technical matters often raised in environmental disputes, and would perhaps be better able to resist attempts by operators to perpetuate the moral ambivalence surrounding these offences. However, the costs of using High Court resolution with any regularity would surely be prohibitive, and it would seem more practicable to create a specialist tribunal of local court level, for example the suggestion by Bates of appointing specialist stipendiary magistrates.⁷² A specialist bench would also perhaps be less susceptible to the trivialisation of environmental offences and to attempts to mask the severity of the incident which are practised by defendants in the magistrates' courts. Such reform could conversely contribute to a further trivialisation of offences. Why should these cases need a separate court structure, unless they are indeed distinct from traditional crimes and deserving of special treatment? A change in the expertise of the bench may, in time, dictate a change in the definition of the offences themselves. A regularly used justification for the strict liability nature of environmental offences is that it simplifies the issues for determination by the judges and alleviates the difficulties the regulator has in proving carelessness on the part of corporate bodies. Under a fault-based framework, defendants able to convince the panel that they had acted as any

⁶⁸ Environment Agency. *Draft Prosecution Policy*. September 1996 (reproduced in Appendix B).

⁶⁹ See 1.3.

⁷⁰ Labour Party Commission (1994) *In Trust for Tomorrow*. (1994) *In Trust for Tomorrow*, p.50.

⁷¹ Department of the Environment, Transport & the Regions. *Environmental Court Project: Final Report*. (Department of the Environment, Transport & the Regions, 2000).

⁷² J. Bates, *Examining Water Pollution Law and Regulation in Light of Current Government and EU Policy*. (1997) Paper presented at Water Law Conference, February 1998, Bloomsbury Hotel, London. A model from which to develop our court structure may be the Land and Environment Division of South Australia's Supreme Court. See further, J. Minor, "Environmental Court of Justice 1991." (1992) *Journal of Environmental Law* 4(1) 159 and W. Upton, "Environmental Courts - The South Australian Initiative." (1994) *Environmental Law* 8(1/2) 12.

reasonable operator would have acted, would escape both penalty and conviction. The decision to change the venue of these cases, is therefore one in which the implications would have to be very carefully weighed and assessed. Whilst a change in venue may appear to be a sensible solution to the increasing complexity in both environmental law and science, it may compound existing problems of trivialisation by confirming environmental offences as different in nature from those 'crimes' dealt with by a bench of magistrates, thereby making prosecution a great deal more difficult.

5.7 Summary & Conclusions

The styles of defence and mitigation used in environmental prosecutions can be seen to continually reinforce the moral ambivalence which characterises these offences as not truly criminal and not deserving of condemnation.⁷³ Hawkins himself drew attention to the 'compromises' inherent in the law's criminalisation of pollution:

*"...the criminal law is given a wide potential reach but little sanctioning power. Strict liability offers ready enforceability, but the penalties impose little cost."*⁷⁴

Further compromises in the fabric of the offences themselves have been noted here such as the absence of a need to prove damage. In addition, the lack of a stereotypical 'victim' in most of these offences makes it difficult for the regulator to sway the court to sympathise with their cause.⁷⁵ The operator, on the other hand, can easily portray itself as the hapless victim of a harsh regime and robust regulator in order to encourage judicial leniency.⁷⁶ Defendants routinely capitalise on these compromises in order that the seriousness of their offence can be masked. Despite any alleged movement of environmental issues up the political agenda and any supposed shift in public opinion,⁷⁷ the data presented in this chapter suggests that the force of progressive stigmatisation should not be over-estimated. The most popular form of mitigation for environmental defendants is to challenge the criminal status accorded to the prosecuted activity; by denying *mens rea*, by trivialising the 'damage' caused and questioning the propriety of bringing a prosecution at all. Such techniques of trivialisation have great import for the effectiveness of the Agency's attempts to use prosecution as the threat underpinning enforcement negotiations.

The Agency, like any regulator responsible for the development and enforcement of standards, is an instrument of social change. Such agencies of social change are ultimately dependent on group norms as much as on formal legal statutes for their

⁷³ A fundamental difficulty with criminal law enforcement in this area, as identified by A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), at p.79.

⁷⁴ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) p.203.

⁷⁵ "It is more difficult to dramatise the threat of pollution than to portray the symbolic assaults on the community from criminals, addicts, vandals and other sinister figures on the fringes of the moral order." Ibid, p.13.

⁷⁶ The Agency is however aware of the potential to dramatise pollution incidents, making increasing use of video footage of the effects of the pollution in court.

⁷⁷ See the suggestions made at the outset of this chapter at 5.1.

regulatory success.⁷⁸ A defendant's successful mitigation will result in a minimal penalty, which, as the courts have recently acknowledged, often reflects the court's view that the prosecution should not have been brought.⁷⁹ Such a response by the courts may in turn reinforce society's view that these offences are not serious. Trivialisation can therefore be referred to as a inhibitor of enforcement style because it tends to reduce the scope of cases which the Agency is likely to view as suitable for prosecution.⁸⁰ This is in contrast with public feeling which generally increases any predisposition to use formal legalistic enforcement as it tends to increase the number of cases viewed as suitable for prosecution.⁸¹

So far this research has concentrated on the regulator's 'environment' in terms of its reaction to the profile of the regulatory population and the expectations of the public at large. The following chapter will look beyond these relationships to other 'environmental' forces which may in part be responsible for the persistence of the compliance-oriented enforcement style and which were largely excluded from Hawkins' own research.

⁷⁸ A. Marcus, 'The Environmental Protection Agency' in J. Wilson, *Politics of Regulation*. (Basic Books Inc. New York, 1981).

⁷⁹ *Environment Agency v Stanford* [1999] Env L R 286 QBD 296-7.

⁸⁰ Some evidence of this was discovered in the course of the officer interviews. For example, one officer referred to a discharge of oil into controlled waters which had been the result of a bungled attempt by gypsies to steal oil from the defendant's premises. The defendant was also partly to blame in failing to respond sufficiently quickly to the incident once discovered. The officer did not recommend prosecution of the defendants on the basis that local feeling against gypsies was high and he felt the bench were likely to sympathise strongly with the defendants. In his words; "*If the case results in a conditional discharge all that has been gained is lost legal costs and bad feeling with that company.*"

⁸¹ H. Croall, "Sentencing the Business Offender." (1991) 30(4) *The Howard Journal*. 280.



Chapter 6

THE DRIVER OF ENFORCEMENT

GUIDANCE

"(T)he multiple reviews made possible by due process protections impede the prompt application of the sanctions established by law. In a variety of ways, therefore the...legal structure of enforcement may well diminish achievement of regulatory goals."

(E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981) p.39).



CHAPTER 6

THE DRIVER OF ENFORCEMENT GUIDANCE

While, ostensibly, the Government did not intend to introduce anything remarkable or new to the style of environmental regulation when creating the Agency,¹ the Agency's publication of its enforcement guidance, demonstrated a new departure from the legacy of opaque regulation. This chapter explores the implications of this externally imposed guidance for enforcement style in the Agency.

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¹ See *The Environment Agency and Sustainable Development* (Statutory Guidance issued under s.4 of the Environment Act 1995) December 1995, particularly House of Commons Environment Committee (1991-2) *Improving Environmental Quality - The Government's Proposal for a New Independent Environment Agency*, Session 1991-92, First Report, Paper 55 where the aims, functions and objectives of the Agency are detailed, including; 'The Government's main purpose in creating the Environment Agency was not to create new functions but to enable existing functions to be carried out in more effective ways...', 'to build on the work of the existing bodies,' 'to adopt...an integrated approach to environmental protection...', 'to adopt clear and effective procedures...' See also Department of Environment. *This Common Inheritance: Britain's Environmental Strategy* (1990) HMSO, Cmnd 1200, para 18. 13 where the introduction of a cross-sectoral regulator appears to have grown largely out of a concern for increased efficiency.

6.5 Targeting

6.6 Cost Benefit Duty & Enforcement Style

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6.8 Summary and Conclusions

6.1 Introduction

As a Non Governmental Public Body, the Agency is not its own master. It is very much shaped by the mandate and jurisdictional boundaries set out by Parliament in the Environment Act 1995. It must also comply with regulatory laws and principles which bind all enforcement bodies.² As a creature of the state the Agency is dependent upon the Government for funding, and political necessity requires it to heed cautions from the Government, such as Michael Meacher's instruction that the Agency should 'get tough' with industry.³ The accumulation of enforcement literature, including that of Hawkins, largely steers away from the issue of the implications that rule formation and policy guidance have as drivers of enforcement style.⁴ In fact, it is generally accepted that enforcement practice and culture shapes the rules rather than the other way about.⁵ This is likely to be due to the fact that, before the appearance of the Environment Agency, the revelation of enforcement policies had been largely absent from regulatory enforcement.⁶ It has been predicted, however, that:

² Such as, for example, the principles of administrative law and the principles of the Deregulation and Contracting Out Act 1994.

³ Spoken of repeatedly by interviewees.

⁴ Although see T. Jewell, & J. Steele, *Law in Environmental Decision-Making*. (Clarendon Press, Oxford, 1998), A. Hoyano, et al. "A Study of the Impact of the Revised Code for Crown Prosecutors." (1997) *Criminal Law Review*. 556, J. Black, "Which Arrow? Rule Type and Regulatory Policy." pp.165-193 in Galligan D. J., (1996) *A Reader in Regulation*, R. MacRory, *Shifting Discretions: The New Formalism*, in *Frontiers of Environmental Law* Ed. Owen Lomas, London, 1992).

⁵ A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994).

⁶ 'Agencies are reluctant to reveal enforcement policies to the public, for fear of tipping their hand.' C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. 257, p.259.

*"...the stronger and more universalistic the agency mandate, then, the greater the potential bargaining strength of proregulatory forces, [and] the greater the potential to embarrass the regulatory agency."*⁷

Given the increased use of publicly available guidance and instruction on Agency enforcement, it is crucial that this study of enforcement drivers deals with the potential impact of such guidance. The principles contained in such guidance may also have an impact on the Agency's pursuit of environmental protection in its enforcement activities.

6.1.1 *Much Ado About Nothing?*

One fundamental objection to the devotion of a whole chapter to the principles of enforcement, is the argument that these principles are an exercise in public relations only and do not play any part in shaping the exercise of enforcement discretion. It is important, therefore, to acknowledge that the Agency's enforcement code tends to be used by officers 'as a signpost rather than a map,'⁸ and that enforcement considerations extend beyond those detailed in published guidance.⁹ Interviews with Agency officers confirmed that the guidance was referred to as an *aide memoir* or checklist when preparing cases for prosecution.¹⁰ A second objection to this chapter could be that these principles do not represent 'change.' Many of the officers interviewed during this research expressed the view that the published enforcement policy had not made any great change to their enforcement practice, and that the principles had always been applied by officers without the need for their formal expression. It is argued here that the formal expression and public availability of these principles has subtle implications of significant import, in terms of increasing opportunities for review of Agency action, and contributing to a detrimental impact on the Agency's bargaining power in the context of negotiating compliance.

⁷ L. Snider, "Co-operative Models & Corporate Crime: Panacea or Cop-Out?" (1990) 36(3) *Crime & Delinquency*. 373, at 385.

⁸ A. Hoyano, et al. "A Study of the Impact of the Revised Code for Crown Prosecutors." (1997) *Criminal Law Review*. 556 p. 564.

⁹ Indeed, the Public Interest test included in the Agency's enforcement code, includes a list of non-exclusive criteria.

¹⁰ Agency personnel use slightly more detailed guidance on regulatory procedures prepared under quality assurance systems.

6.1.2 A Change in Regulatory Climate?: The Principles of 'Firm but Fair' Regulation¹¹

The Agency's power to prosecute contravention of environmental protection legislation¹² is discretionary. The economic model of deterrence acknowledges, generally, that prosecution of all offences is too costly to be feasible.¹³ Choices must, therefore, be made as to which cases should be prosecuted to maximise enforcement efficiency. The creation of rules designed to regulate such decisions is a means of facilitating the pursuit of independent enforcement and accountability.¹⁴

There are a number of formal principles which currently regulate Agency officers' prosecutorial discretion. They include the Agency's statutory duty to have regard to the costs and benefits of its actions and the Enforcement Code of Practice.¹⁵ The Agency's Enforcement Code endorses four 'standards' which are to inform the administration of both formal and informal mechanisms of enforcement.¹⁶ These principles are; **(i) Proportionality** in applying the law and securing compliance, **(ii) Consistency** of approach, **(iii) Targeting** of enforcement action, and **(iv) Transparency** about how regulation operates and what those who are regulated may expect.¹⁷

We have already seen in chapters 4 and 5 that the Agency is often driven internally by the search for increased legitimacy/credibility. The drive for legitimacy in the eyes of the public sometimes directs the Agency towards prioritising those visual cases of pollution which have excited the public imagination. In pursuing credibility

¹¹ This term is used in the policy itself at para 9.

¹² Section 37(1)(b) Environment Act 1995, which states that the Agency 'may institute criminal proceedings.'

¹³ G.J. Stigler, "On the Optimal Enforcement of the Law." (1970) *Journal of Political Economy*. 526, at p.527.

¹⁴ This process has been termed, 'legalisation.' See J. Jowell, "The Legal Control of Administrative Discretion." (1973) *Public Law*. 178 at p.180. Standards differ from rules in that rather than specifying definite limits to powers or permissions, they require a qualitative appraisal of the facts, Jowell (ibid.).

¹⁵ A general strategy document which contains the four principles of proportionality, consistency, transparency and targeting which are to inform the use of enforcement discretion). The Environment Agency (1996) *Environment Agency Enforcement Code of Practice - May 1996*. Published at Sweet & Maxwell's Environmental Law Bulletin, June 1996, p.1. This has since been amended and republished at Environment Agency (1998) *Enforcement and Prosecution Policy*.

¹⁶ The principles of 'fair' consistent and transparent enforcement emanate from Schedule 1 of the Deregulation and Contracting Out Act 1994 which creates powers to require fair, consistent and transparent enforcement procedures. To view the Agency's published enforcement policies in full, see Appendix D.

¹⁷ See paras 9-18.

by obtaining maximum penalties in the courts, the Agency must present to the courts only those cases which coincide with the judiciary's notion of punishable conduct. The principles of enforcement discussed in this chapter arguably comprise a further effort to increase legitimacy, this time instigated not by the Agency itself but, externally, by Whitehall.

Professor Robert Baldwin describes five means which have been used to legitimate administrative systems, two of which seem particularly apt here.¹⁸ The first, *the expertise claim*, legitimates systems and action on the basis that the decision maker possesses professional judgement, and ought to be afforded a wide discretion in which to make the most appropriate decision. The second, *the due process claim*, uses notions of respect for individuals, fairness and even-handedness to justify procedures or actions. From what was said in chapter 2, particularly concerning HMIP and the Alkali Inspectorate,¹⁹ it seems that the *expertise claim* has traditionally been heavily relied on by environmental regulators to legitimate their enforcement action or inaction. The principles of enforcement to be discussed in this chapter represent a significant shift towards the *due process claim* of legitimacy. Certainly, three of these principles (*proportionality, consistency and transparency*) reflect a concern with procedural justice in the treatment of individual cases.

The following section examines the published principles of enforcement which the Agency operates under and asks whether these principles represent something new in environmental enforcement, how these principles might be applied to Agency enforcement and what are the implications of applying them?

¹⁸ R. Baldwin, *Rules and Government*. (Clarendon Press, Oxford, 1995), pp.42-46.

¹⁹ At 2.2.

6.2 Proportionality: Paras 10-11

This first principle of the Agency's published enforcement code, 'proportionality', is stated to mean:

*'...relating enforcement action to the risks and costs...Action taken by the Agency to achieve compliance should be proportionate to any risks posed to the environment and to the seriousness of any breach.'*²⁰

The Code seems only to contemplate a role for proportionality where duties are not specific or mandatory. However, where the Agency is required to control risks *reasonably, appropriately or as it thinks fit*, the principle of proportionality dictates that: *"cost(s) to the environment as a whole, ...to regulated organisations as well as the degree of risk..."*²¹ are to be taken account of. As the Agency's enforcement function is made up of permissive powers to prosecute, to serve notices and to warn rather than specific or mandatory powers,²² the principle of proportionality must have direct application to enforcement practice.

It can be argued that the impact of the principle of proportionality on enforcement style is likely to be minimal. After all, there is evidence that a 'weighing of costs and benefits' was already an implicit part of environmental regulation long before the creation of the Environment Agency. The Best Practicable Means/BATNEEC concepts which have permeated the history of UK regulation of the process industries,²³ required a balancing of the costs and benefits of pollution abatement. Such balancing processes were not exclusive to process industries regulation. In waste regulation, national guidance advised that enforcement should be informed by 'proportionality,' by distinguishing between incidents which constituted a threat to environment and health and technical breaches which did not produce such risks.²⁴ From this perspective, the function of proportionality is merely a device to foster an integrated culture of regulation within the Agency, or to increase openness in the decision making process,²⁵ and may not, in fact, have any impact on enforcement style.

²⁰ Para 13.

²¹ Para 15.

²² For more detail on this see 7.6.

²³ See chapter 3, footnote 47 for a summary of this concept.

²⁴ National Association of Waste Regulation Officers. *Guidance for Waste Regulation Officers*. (1994).

²⁵ K. Heinemann et al. "The Impact of Cost Benefit Analysis on Federal Administrative Law." (1991) 42 *Administrative Law Review*. 545, at 548.

6.2.1 How Can Proportionality be Applied to Agency Enforcement Action?

The concept of proportionality has traditionally been used to explore the relationship between objectives and the impact of decision making. A decision or action is 'proportionate' if its impact on the individual or society is justified with reference to the legitimate policy objectives of the decision maker.²⁶ In order, therefore, for the proportionality principle to be applied to Agency enforcement, the Agency's objectives must be relatively clear and unequivocal. This they are not. The Agency's functions of both '*preventing and minimising pollution*,'²⁷ and of issuing licences to pollute,²⁸ create a stark illustration of its incompatible roles.²⁹

One Agency officer referred to the further confusion created by the removal of the word, 'Protection' from the Environment Agency's title:

*"It would have been better if the Agency had been called the 'Environment Protection Agency', then we would know what the aim was. As it is, we don't know whether we are supposed to pursue protection of the environment at all costs, or just do the glamorous work."*³⁰

Moreover, the overriding statutory aim of the Agency is to, '*make a contribution to the attainment of sustainable development*.'³¹ As a guide to day to day operations, this goal is vague and equivocal. 'Sustainability' as a legal term has its origins in the 'soft law' of international conventions, thus meaning it is too vague for breach to give rise to any sanction.³² Consequently, there are strongly held views that the term is only of symbolic value:

²⁶ This is clear from G. De Burca, "Proportionality & Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law." (1997) *European Public Law* 3(4) p.561, which draws on EC caselaw to arrive at the essence and status of proportionality.

²⁷ Section 5 Environment Act 1995.

²⁸ See ss.6 and 36 of the Environmental Protection Act 1990 and Schedule 10 of the Water Resources Act 1991.

²⁹ This may be more so in waste management regulation where presumptions for the grant of licences exist in certain circumstances. It is, therefore, the refusal of licences, rather than the grant of licences which must be justified. The presumption exists where the Agency is satisfied the applicant is fit and proper and that refusal is not necessary to prevent pollution, harm to human health or serious detriment to the amenities of the locality. See subsection 36(3) Environmental Protection Act 1990.

³⁰ Agency officer interview, October 1997.

³¹ S.4 Environment Act 1995.

³² "...it is difficult to draw any legal consequence out of this principle, though in theory there might be some." L. Kramer, *EC Treaty and Environmental Law*. 2nd Edn. (Sweet & Maxwell, London, 1995), p.64.

*"...[it is] an impossible ideal that serves to mask the continuation of exploitation and brutality that have characterised much of human endeavour."*³³

Much parliamentary debate over the Environment Bill focused on the lack of consensus on the meaning of the sustainable development clause. A Select Committee convened on the attainment of sustainable development, spent a significant proportion of its time endeavouring to solve the same riddle.³⁴ The statutory guidance issued to the Environment Agency to supplement the Environment Act 1995 adopts the 'Brundtland' definition of sustainable development, that is:³⁵

"[D]evelopment that meets the needs of the present without compromising the ability of future generations to meet their own needs."

The first difficulty is that, although given much authority through repetition, this definition unfortunately does not clarify the term 'development.' Secondly, there is no quantification of the 'contribution' the Agency is expected to make. In essence, most definitions seem to advocate the protective role of sustainable development, protection being of both the environment *and* the economy:

*"Stable prosperity can be achieved throughout the world provided the environment is nurtured and safeguarded."*³⁶

It seems at odds with the notion of an 'Environment' Agency that such a body's overriding goal makes it responsible for ensuring protection of both the environment and the industrial economy. Surely, the industrial community is well placed to look after itself. Are not organisations such as the Confederation of British Industry and the Chemical Industries Association responsible for the protection of such interests? The notion of pursuing economic development and environmental protection in tandem, which features in official definitions of sustainable development, does not, however, seem to be supported by officers' views of the Agency's primary objective. Of the 100 Agency officers surveyed, **70%** chose 'environmental protection' as their primary aim in preference to the aim

³³ T. O'Riordan, *Interpreting the Precautionary Principle*. (Earthscan Publications, London, 1994) at p.37.

³⁴ House of Lords Select Committee on the Environment. *Sustainable Development* 1995. 1994-95 HL 72.

³⁵ Taken from the 1987 'Brundtland Report', The World Commission on Environment and Development. *Our Common Future*. (1987).

³⁶ Thatcher, M. speech to the Royal Society 27th February 1988. For a list of definitions, see D.W. Pearce, A. Markandaya & E.B. Barbier, E.B., *Blueprint for A Green Economy*. (Earthscan, London, 1989), at pp.173-185.

of sustainable development.³⁷ This finding further complicates the question of what the Agency's objectives are, as it seems the official response may differ significantly from the personal views of Agency officers.

It seems then, that the statutory aim of sustainable development only confirms the moral ambivalence which still surrounds the criminalisation of pollution and society's ambivalence towards the Agency's function. Indeed, the overriding statutory aim of making a '*contribution to sustainable development*' is so imprecise and unclear in determining the balance of the Agency's loyalties to the environment and industry, that it arguably nullifies proportionality as having any meaningful impact on enforcement style. If we do not know what the policy objectives of the Agency are, we cannot begin to explore whether they *justify* the action complained of.

6.2.2 The Impact of 'Proportionality' on Enforcement Style

If the equivocal aim of making a contribution to sustainable development is pushed aside for a moment, and the aim of the Agency is assumed instead to be the unqualified protection of the environment, how would the application of 'proportionality' impact on regulatory style? There is evidence that the outcome of regulatory bargaining may occasionally violate what many would understand by proportionality. A radioactive substances inspector spoke of the commonly used tactics in which operators were given very little operational headroom, and millions of pounds would be spent for very small returns in radioactive dose reduction. He spoke of persuading operators to spend in the region of five or six million pounds which, on a scientific risk appraisal,³⁸ would justify expenditure of only tens of thousands. The justification for overriding the cost-benefit analysis may be that the Agency has many other drivers to take account of; public opinion and perception, past and present Government policies, past and present Government pronouncements and international commitments and perceptions. When the operator spends millions of pounds:

"...the environment is slightly better off, the Agency looks, and is, a stronger regulator, Government policy has been adhered to, and the

³⁷ As opposed to 18% who chose sustainable development as their primary aim. See Appendix, B, Q B1.

³⁸ Using the ICRP which provides a formulae for determining how much it is worth spending to eliminate a specific amount of pollution or risk. This is effectively a mechanism for performing a cost benefit analysis for proposed site improvements.

Government can demonstrate its commitment to international agreements. ³⁹

Strictly speaking of course, this does not represent 'proportionate' regulation, as required by the Agency's code of practice. The Inspector knows he is treading a very thin line, all the time taking a chance that the operator will not consider it worthwhile to take a judicial review action against the Agency (a possibility which is enhanced by the outward promise of proportionate enforcement).⁴⁰ The possibility that an enforcement officer's representations and action, in the process of negotiating compliance, may be called into question because of the introduction of the proportionality principle means that the principle stands as a potential threat to the tradition of 'bluff' in environmental enforcement⁴¹ (and, consequently, the Agency's bargaining power).

6.3 Consistency: Paras 12-13

'Consistency' is not to be equated to uniformity or the quality of being 'unchanging,'⁴² an impossible goal where an operation on the scale of complexity as the Agency is concerned. The Agency's enforcement policy explains consistency as: *'taking a similar approach in similar circumstances to achieve similar ends.'*⁴³ It is a principle founded in fairness; a moral desire for even-handedness.⁴⁴ The Code expressly recognises that businesses have an expectation that the Agency will operate consistently in; tendering advice, the use of their powers, response to pollution incidents (which presumably means their response in enforcement terms) and their decisions of whether to prosecute.⁴⁵

Does consistency represent a new driver of enforcement in environmental regulation? To the extent that the consistency principle contemplates a part in integrating the three sectors of pollution control, the provision *is* new. But as

³⁹ RAS interviewee, May 1998.

⁴⁰ See further chapter 7 on reviewability.

⁴¹ See earlier at 1.1.4.

⁴² Oxford English Dictionary.

⁴³ Para 18.

⁴⁴ K. Hawkins, "Bargain and Bluff." (1983) *Law & Policy Quarterly*. 35, p.54.

⁴⁵ Para 19. Moves have been made towards enforcement consistency within the Agency. In particular, a group entitled Integration and Environmental Policy has been established as a part of the Environmental Protection Directorate, with the mandate of fostering harmonisation between the diverse enforcement cultures of water, waste, IPC and radioactive substances. A member of this group commented that he would adopt the principle that harmonisation should only be pursued where it was *'possible, practicable and necessary'* (Agency interviewee, September 1997). The Agency's interpretation of consistency is therefore far from as an absolute concept, and as permitting much in the way of exception and qualification.

regards each sector taken separately, there is some evidence that environmental regulatory officers applied a norm of consistency prior to its formal expression in enforcement policy. Enforcement officers would not be prepared to bargain with the operator where their unlawful activities echoed another, very similar instance, where compliance had been required.⁴⁶ This concern with enforcement consistency was confirmed by interviews conducted in this research. One waste regulation officer gave an example of two licensed waste transfer stations. Due to the different dates on which the licences were issued, the required height for the surrounding wall was greater for one of the sites. The owner of this site often complained that the neighbouring stations had a lower boundary wall. The officer would only enforce the lower height against both site owners in an effort to maintain fairness between the two sites.

The following section discusses one of the means by which the Agency has chosen to implement 'consistency' in enforcement. This is the Agency's commitment to the collation of quarterly enforcement statistics.

6.3.1 How Can Consistency be Applied to Agency Enforcement Action?

Consistency cannot be achieved unless individuals, managers and regions know where they stand in relation to colleagues elsewhere, and can assess performance over time.⁴⁷ It is, therefore, a precondition of 'consistent regulation' that mechanisms for measuring performance are in place. Whilst, ideally, a regulator should be able to assess 'performance' in terms of attainment of objectives (for example, environmental protection and improvement), this is an impossible task. The state of the environment is indeed monitored over time,⁴⁸ but if twenty years hence the environment appears to have measurably improved, there is no way of clearly attributing this to the Agency's performance over other factors. A few Agency officers interviewed felt that improvements in water quality were not necessarily the result of regulatory efforts, or of any enforcement activities, but were merely a consequence of massive industrial closure.⁴⁹ In order to assess its

⁴⁶ See A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), at p.97 A. Ogus, & G.M. Richardson, "Economics and the Environment - A Study of Private Nuisance." (1978) *Cambridge Law Journal*. 284, at 346-352 and K. Hawkins, et al *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984).

⁴⁷ M. J. Davies, "The Agency Lawyer's View." Paper presented at the Prosecution by Regulatory Bodies Conference, September 1998, University of Oxford. .

⁴⁸ The Agency produces a 'State of the Environment Report' available on its website, in accordance with its statutory duty to compile data relating to pollution, see s.5(2) Environment Act 1995.

⁴⁹ See also N. Nuttall, *The Sunday Times*, (1997) 5th June, p.12. who reports that reductions in water pollution incidents in 1996 may be attributable to drought, with less pollution being washed into

own performance then, the Agency must look beyond technical/scientific data on the state of the environment to evidence which better lends itself to calculation and comparison across time. Enforcement statistics can be counted and are an obvious choice of performance measurement. A necessary implication of consistency is, therefore, that there must be a circulation of statistics which provides Agency personnel with a benchmark of enforcement in other regions and departments.

The information requirements of pursuing consistent enforcement have been addressed by the Agency's 'Operational Performance Measures' ('OPMs'). These are enforcement statistics collated quarterly which are used to determine resource allocation. OPMs include numbers of enforcement notices issued, cautions and prosecutions for the separate offences. It is important to mention here, that the collation and valuing of enforcement statistics as outcomes is also necessitated by the political ambivalence which impacts on Agency action. As was stated earlier, the general public tends to equate frequent prosecution and heavy fines with 'effective regulation,' and in turn, court action is viewed as a *'final indicator of the state's seriousness of purpose.'*⁵⁰

There are a number of limitations to consistency as a driver of enforcement style in the field. Firstly, the principle of enforcement consistency will always face the inherent limitation of 'invisible' discretion. The officer's exercise of discretion is often hidden even from his/her managers. An inherent element of discretion-based enforcement is that officers may decide not to record instances of breach for a variety of reasons; because they do not consider the event to constitute an unlawful act, because they are rewarding the operator for good overall compliance or because they are using abstention from a formal recording of breach as leverage in getting something more serious dealt with. The Agency knows this enforcement behaviour occurs but cannot estimate its extent.⁵¹ Such hidden exercise of discretion remains largely outside attempts to attain consistency. Secondly, if an officer has left the site of an incident having decided to take no formal action, that decision is often irreversible, as the evidence necessary for caution or prosecution is likely to have disappeared on return to the site. This practical irreversibility of on-site judgements

rivers and streams, , and H. Scarrow, "The Impact of British Domestic Air Pollution Legislation." (1972) 2 *British Journal of Political Science*. 261, for suggestions that improvements in air quality in the UK were not as is often maintained, the results of the Clean Air Acts, but would have happened anyway.

⁵⁰ P. Yeager, *The Limits of Law: The Public Regulation of Private Pollution*. (Cambridge University Press, Cambridge, 1991), p.251.

⁵¹ Agency personnel, September 1998.

once again, demonstrates the breadth of discretion exercised by the field officer which is not easily subjected to mechanisms of consistency.

6.3.2 The Impact of 'Consistency' on Enforcement Style

Enforcement statistics have no necessary meaning in terms of the Agency's ultimate objective of environmental protection, and are not necessarily meaningful for the purposes of resource allocation. For example, a zero level of enforcement notices in one department could indicate that no offences are being committed and therefore no additional funds are needed. The same statistic could also give rise to the conclusion that the department is not doing its job, or that it has an aversion to legalistic enforcement.

This tendency to make a rough equation between performance and easily calculable data invariably results in a misdirection of regulatory effort towards maximising enforcement statistics, as opposed to producing objective related outcomes.⁵² Scheme of Delegation Review meetings (SOD meetings) are held monthly in each region of the Agency to assess proposed enforcement action, including who to prosecute. The review mechanism clearly provides scope for furthering consistent enforcement as non-conforming recommendations can be rejected:

*"In my personal experience I know my recommendations are more often 'pushed up' than 'pushed down.' "*⁵³

Even in process industries regulation, it was reported in 1998 that the Scheme of Delegation meetings⁵⁴ did not often reject cases for prosecution but, quite the opposite:

*"At the moment the Agency wants more prosecutions...We have to be really careful, because if they [the SOD meetings] hear so much of a whisper of a prosecution, they will want you to put together a case."*⁵⁵

Although the function of the SOD appears ostensibly to be a mechanism for ensuring consistency it also appears to operate as a politically responsive gauge of

⁵²There is evidence that this has happened with the Agency's dogged pursuit of inspection targets - see 'Agency Makes a Mess of Waste.' (1998) *ENDS Rep* 280, May, p.25.

⁵³ Interviewee, March 1998.

⁵⁴ These are meetings of regional managers held monthly to review the enforcement action proposed by the regional teams of enforcement officers.

⁵⁵ IPC interviewee, June 1998.

enforcement activities, which can be used to regulate the frequency of court cases according to public and political demand.

These statements suggest that the Agency's recent enthusiasm for enforcement statistics (due to the emphasis on consistency and the increasing need to respond to political ambivalence) has had a real impact on enforcement style. The Agency's new emphasis on enforcement statistics represents a shift towards the sanctioning approach to enforcement where:

*"...agents are organizationally rewarded by how well they measure up to the relatively concrete criteria provided by the enforcement process."*⁵⁶

The shift towards an increased emphasis on 'sanctioning' styles of enforcement is manifested only in relation to certain types of case, and does not necessarily mean increased prosecution rates across the board. This is because, if case numbers are deemed important, this in turn produces a preference for simple/routine cases. A small number of interviewees suggested that the Agency preferred to process cases where legal proof was uncomplicated, where there were less technical hoops to jump through, and where legalistic defence was less likely. In the field of environmental regulation, these are the offences related to unauthorised activities; unlicensed waste management sites, and particularly unlicensed anglers. The penalties are likely to be so small that it is not worth the defendant's time resisting the prosecution. The only proof the prosecutor needs is that on a particular day, the defendant was found performing some activity without a licence (for which there is generally no defence).⁵⁷ This theory of case maximisation can be used to explain the universal prosecution of anglers without rod licences noted in chapter 3 as compared with the estimated 1% prosecution rate for other offences.⁵⁸ This further augments the trend noted in chapter 3, that larger operators, engaged in potentially more hazardous activities, are least likely to be prosecuted.⁵⁹ This explanation for rod licence prosecutions arguably defies the principle of efficient deployment of

⁵⁶ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) at 71. In contrast, compliance styles of enforcement are associated with regarding enforcement statistics not as an indicator of success, as prosecution is a sign of enforcement failure.

⁵⁷ See ss.6(1) and 23(1)(a) EPA 1990 prohibiting prescribed processes without an authorisation, ss.33(1)(a) and (b) prohibiting dealings with waste without a licence, s.88 WRA 1991 providing a defence to water pollution offences where a consent or licence is in force and s.27 Salmon & Freshwater Fisheries Act 1975 making Angling without a licence an offence.

⁵⁸ See, for example, fig 2.3 on estimated prosecution rates in the water pollution sector and the estimated 0.3% prosecution rate in the prescribed processes sector at 2.1.1.

⁵⁹ 3.3.3.

resources and targeting, on the grounds that court action is being directed towards low risk, less serious activities at the expense of the more serious.

At another level, however, 'consistency' is likely to produce a downturn in formal enforcement. The potential for regulatory negotiation can only have increased by the greater accessibility to consent and licence conditions by the public, enabling licence holders to check the conditions imposed on the neighbouring site.⁶⁰ The consistency principle alongside the operator's access to licence details for other operators, potentially increases the operator's bargaining power. Simultaneously, in raising expectations of consistent regulation, the discretion of enforcement personnel is reduced. The possibility that the Agency will be called to account for operating in an inconsistent manner, is capable of further compromising the Agency's bargaining power in enforcement negotiations. Of the four enforcement principles, it is 'consistency' which is most likely to lead to successful judicial review.⁶¹

Efforts to produce consistency at any level of Agency decision making are likely to result in a focus on throwing out cases rather than proceeding in more cases to preserve consistency. This is because, provided the 'consistency' standard is capable of being the subject of review of Agency action or complaint,⁶² it is most likely this review would be initiated by a company proceeded against alleging the decision is inconsistent with earlier decisions or representations. Allegations that a decision 'not to enforce' is inconsistent, are far less likely to be challenged, as the parties with the 'direct interest' necessary for review⁶³ are unlikely to be motivated to complain. Also, it is easier to abandon legal proceedings than to commence them once the opportunity to collect 'on the spot' evidence has passed.

6.4 Transparency: Paras 14-15

The principle of 'transparency' is explained by the code as, '*helping licence and consent holders and others to understand what is expected of them and what they should expect from the Agency.*'⁶⁴ The principle is clearly intended to apply

⁶⁰ See section 190 WRA 1991, and sections 20 and 64 EPA 1990.

⁶¹ See later at 7.7.1.

⁶² For a recent review case on the ground of consistency, see *R v Director General ex parte Scottish Power* (1998) Lexis 3rd February 1998, CA and discussion of this case at 7.7.1.

⁶³ Section 31(3) Supreme Court Act 1981 provides; "No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates."

⁶⁴ Para 21.

primarily to the Agency's relationship with industry. The Agency must make clear what it is *advising* regulated organisations to do, what it is *instructing* them to do and must make clear its intentions as to enforcement action. Therefore, although the 1996 code did refer to 'others,' it was not at first apparent that the principle was intended to apply to the Agency's relationship with the general public. Also, in specifying clarity of intention to act, the code suggested that the principle was one of 'advance transparency' (i.e. clarity as to why action is to be taken) rather than 'retrospective transparency' (which involves traceability of decision making and giving reasons for decisions).⁶⁵

6.4.1 How Can Transparency be Applied to Agency Enforcement Action?

This principle of transparency was, under the 1996 code, translated into a bundle of 'rights' awarded to business in the regulatory process. The content of these rights was as follows:⁶⁶

- (a) Where an Agency officer told the business to do something without taking formal action, the business was entitled to a letter, when requested, detailing what needed to be done by the business and why.**
- (b) Before any formal action was taken the business had a right to a 'minded to notice' and to make representations.**
- (c) If immediate action was to be taken, the business had a right to a written statement detailing why immediate action was seen to be necessary as opposed to any other response; and**
- (d) When formal action was taken, the business was entitled to be told its rights of appeal.**

⁶⁵ Author's own terminology.

⁶⁶ The Environment Agency Enforcement Practice Guidance for Warranted Officers which reflects the principles of the Deregulation and Contracting Out Act 1994 (see The Environment Agency (1996) *Environment Agency Enforcement Code of Practice - May 1996*. Published at Sweet & Maxwell's Environmental Law Bulletin, June 1996, p.1).

6.4.2 The Impact of 'Transparency' on Enforcement Style - 'Minded to' Notices

The detrimental impact of conforming to the transparency principle has recently been exposed by the operation of the 'minded to notice' ((b) above). Quite apart from a general delay factor in enforcement action, interviews with Agency officers revealed that these 'minded to' notices were not entered on public registers, and therefore served to conceal both industry's failure to meet requirements and the Agency's enforcement profile. If industry, in reply to the 'minded to' letter, promised to make amends stating that it had executed or was about to execute the required improvements, there was no longer any justification for serving the enforcement notice. Many of these notices were, therefore, never served and this fact produced a distortion in enforcement statistics:

*"I have not issued an enforcement notice since the 'minded to' system came in. I have issued three 'minded to' notices, so they are on record here but they are not in the public domain."*⁶⁷

The 'minded to' notice unwittingly created a loophole in the bargaining process, which would undoubtedly, in time, be abused by recalcitrant operators. The threat of enforcement could be easily discharged, industry could continue non-compliance in the secure knowledge that if and when a minded to notice arrived, they could defuse the threat of enforcement by pre-empting the enforcement notice and securing improvements without risking a blot on their compliance record. In other words, the unpredictability had been taken out of the bargaining process, thereby reducing the Agency's chances of securing compliance at an earlier stage in negotiations. The minded to notice, while facilitating transparency to the regulated population, ironically obscured transparency of enforcement to the public eye, and has been omitted from the Agency's revised enforcement policy.⁶⁸

6.5 Targeting: Paras 16-18

The principles explored above measure the efficacy of decision making by the due process criterion of their fairness to regulated organisations. Accountability is, in this sense, being geared towards the role of the Agency in its relationship with industry, rather than its role as protector of the environment for the benefit of the

⁶⁷ IPC/RSR interviewee June 1998.

⁶⁸ The Environment Agency. *Enforcement and Prosecution Policy*. (November 1998). There is no express reference to the abandonment of the minded to notice, but Agency officers have been instructed not to use them.

public at large. It is perhaps significant that, of the four principles of enforcement, three are designed to ensure fair regulation, and only one can be said to directly concern efficient pursuit of environmental protection. The 'targeting' principle is explained in the Agency's policy as; 'making sure that regulatory effort is directed primarily towards those whose activities give rise to or risk of serious environmental damage' (*sic*).⁶⁹ As a principle related to efficient regulation rather than fairness, it is submitted that targeting does not present a direct threat to the tradition of bargain and bluff.

6.6 The Cost Benefit Duty & Enforcement Style

Section 39 of the Environment Act 1995 places the Agency under a duty to take into account the 'likely costs and benefits' when deciding whether to exercise its statutory powers. The Environment Act expressly declares that the duty does not apply where; (i) it would be unreasonable in the circumstances; and (ii) the Agency has a mandatory obligation.⁷⁰ The duty does apply when the Agency is '*deciding whether to exercise its powers*'.⁷¹ Thus the obligation to take account of costs and benefits applies to situations where the Agency has the option of more than one means of achieving a given objective. Guidance on the application of the cost benefit duty (published by the Agency) suggests that enforcement is a 'duty' and that there is no requirement to conduct cost benefit assessments of enforcement decisions.⁷² It is submitted that this would not be a correct interpretation of the duty, for while there is a duty to enforce the law,⁷³ there is a discretion as to how enforcement should be pursued. The Agency, when faced with evidence of an offence, has no **duty** to take specific action, it has the **power** to use a range of formal and informal tools of enforcement (see, for example those mechanisms detailed at fig 1.1). The duty is to apply not only to strategic planning but also to 'individual cases.'⁷⁴ These factors tend to confirm that Parliament did intend the

⁶⁹ The Environment Agency. *Enforcement and Prosecution Policy*. (November 1998) at para 16.

⁷⁰ Section 39.

⁷¹ Ibid.

⁷² Environment Agency (1996) *Taking Account of Costs and Benefits*. Sustainable Development Series SD3, at 11.1.

⁷³ For example, as a necessary ingredient of the broader duty which stipulates that "*the Agency's pollution control powers shall be exercisable to prevent or minimise or remedy or mitigate the effects of pollution to the environment.*" (section 5 Environment Act 1995). There is also a more precise enforcement duty in the waste management sector to ensure compliance with waste management licences and to ensure waste management activities do not cause harm to the environment (s.42 EPA 1990). CF. the specific enforcement duty imposed on local authorities to enforce statutory nuisance laws (Sections 79-80 EPA 1990), and further discussion of this issue at 7.6.

⁷⁴ ENDS Rep 243 p.25, confirming details of the Agency's statutory guidance.

cost benefit duty would apply to the enforcement discretion of the Environment Agency.⁷⁵

While the cost benefit duty (the 'CBD') received a hearty welcome from industry, it met with great misgivings from the environmental organisations' quarter, a view which largely focused on the possibility of Agency action being subject to legal challenge in the courts.⁷⁶ Those who were unsure of the duty urged the Government to reserve the cost-benefit duty for later guidance to be issued to the Agency rather than using it on the face of the Bill when so little had been agreed as to the meaning of such a controversial clause:

*"When legislators enact a statute without agreeing on what it means, even the most conscientious representatives of the executive and judicial branches will find it difficult if not impossible to enforce and interpret the law."*⁷⁷

Whilst some commentators argue that putting a value on environmental costs and benefits will not present insurmountable problems, there has been recent indication that the methodology for such a task is far from agreed. This was starkly illustrated in a challenge by *Thames Water* of an Agency decision in which the Agency had valued the River Kennet at £13 million. This sum was forty two times the value placed on the same river by the Government Inspector.⁷⁸ This incident highlights the diverse interpretations which can attach to costs and benefits in the same matter. The scope of this research is not broad enough to provide a comprehensive analysis of this issue,⁷⁹ the focus will instead remain on the weighing of the 'costs' and 'benefits' of formal and informal enforcement strategies.

⁷⁵ See Environment Agency (1996) *Taking Account of Costs and Benefits*. Sustainable Development Series SD3 where the Agency talks of 'benefits' as including 'upholding the law.'

⁷⁶ See 'Cost benefit duty and contaminated land remain leading issues in Environment Bill.' (1995) *ENDS Rep* 243 April 1995, p.25. Criticism was also directed at the duty's impact on the Agency's aims; *"The agency's job is to fight pollution, to protect the environment and to promote sustainable development. It cannot do these things if it is constantly going to test their outcome against business costs."* Lord William of Elvel at Hansard (HL) 15 December 1994, col.1382.

⁷⁷ See also J. K. Baum, "Legislating Cost Benefit Analysis: The Federal Water Pollution Control Act Experience." (1983) 9(1) *Columbia Journal of Environmental Law*.75.

⁷⁸ *Environment Action* (1998) April/May Issue 13, p.1.

⁷⁹ For further details of this debate see J. Bowers, *Liquid Assets*. (CPRE, 1988), R. Attfield, & K. Dell, *Values, Conflict and the Environment* (Oxford Ramsay Centre, Oxford, 1989), D.W. Pearce, A. Markandaya & E.B. Barbier, E.B., *Blueprint for A Green Economy*. (Earthscan, London, 1989), M. Sagoff, "Ethics and Economics in Environmental Law" in T. Regan, *Earthbound*, at p.147 (Temple University Press, New York, 1984) at p. 147.

The relationship of the duty with enforcement or any other of the Agency's objectives is unclear and invites examination. The following section will address the questions of:

- 1. Does the duty require the cost of enforcement to the regulated industry to be taken into account?;*
- 2. How will the duty affect enforcement style?*

6.6.1 Costs Imposed on Regulated Entities

Which 'costs' should the Agency have regard to? 'Costs' are defined in the Act as including costs to any person (which includes organisations) and to the environment.⁸⁰ Stigler⁸¹ saw one of the common failures of regulation as the refusal to take into account the costs of enforcement imposed on the regulated entity. In particular, he felt that for regulatory offences, where 'guilt was a fiction',⁸² the costs of defending a prosecution should be taken into account as part of the 'costs' of enforcement. Stigler's particular objection was that such 'defence' costs would inevitably be passed on to the operator's consumers. This was a 'perverse allocation,' as the regulatory regime was usually designed for the protection of consumers. The perverse allocation argument is a persuasive attempt to question the propriety of a system which ultimately 'punishes' the victims of the offence. But what this argument fails to recognise, is that the transfer of enforcement costs to consumers is consistent with the broader ideological functions of criminal law. Increased consumer costs, accompanied by the injury to the operator's reputation, are likely to direct consumer preferences away from operators who are taking greater environmental risks and who expose themselves to criminal liabilities.⁸³ This brief diversion illustrates that the defensibility of taking 'defence' costs' into account when deciding whether to prosecute, is far from clear cut (although the accepted meaning of the Agency's overarching duty to contribute to sustainable development would suggest that operator costs *should* be taken into account).⁸⁴ Also, the prosecution of strict liability offences disguises the distinction between operators who could not have done anything to prevent breaking the law and those who chose to break the law, as all are prosecuted under the same provisions. It

⁸⁰ See section 56(1) EA 1995 and The Environment Agency and Sustainable Development (Statutory Guidance issued under s.4 of the Environment Act 1995) December 1995, p.11.

⁸¹ G.J. Stigler, "On the Optimal Enforcement of the Law." (1970) *Journal of Political Economy*. 526, at p.532.

⁸² i.e. because offences were often strict liability and not based on a finding of fault.

⁸³ Of course, this would not be true of monopolistic organisations such as water companies.

⁸⁴ See earlier at 5.1.1.

would therefore be difficult to decide in which cases defence costs are incurred without 'guilt', and according to Stigler should therefore be taken into account.

6.6.2 The Impact of the Cost Benefit Duty on Enforcement Style

In the context of enforcement, the CBD seems to dictate that the comparative costs of different approaches to enforcement should be weighed by the Agency. Chapters 2 and 3 focused on the continuum of enforcement styles. The polar positions of this continuum were the compliance strategy (based largely on informal enforcement) and the sanctioning strategy (based largely on confrontational formal enforcement). The most significant 'cost' in compliance-based styles of enforcement is probably manpower. Sanctioning styles of enforcement are likely to be considered more costly, particularly when court time and legal fees are involved.⁸⁵ Indeed, this view had some support from the Water Authorities in the 1980s:

By and large water authorities do not see pushing cases to prosecution as the best way to tackle industrial pollution unless that is the only way that produces effective results, they prefer to try persuading and preventative measures first and they generally argue that is more cost-effective than prosecution."⁸⁶

The argument that the CBD furthers the preference for non-formal enforcement relies on the assumption that prosecution is resource intensive.⁸⁷ Is this assumption justifiable? The resource intensive nature of prosecution was a real problem when environmental regulators were not authorised to recoup the cost of legal proceedings from defendants. In theory, these limitations are now resolved with the statutory requirement that the Agency seeks costs from the defendant. This requirement is buttressed by judicial instruction that there be a presumption that prosecutors' 'costs' should be recovered.⁸⁸ If further evidence were needed to persuade the courts that full costs should be recouped from defendants, reference could be made to the Polluter Pays Principle, which informs the majority of Government policy in this field of regulation.⁸⁹ The principle encourages all

⁸⁵ Although the Agency has its own legal department, it still employs barristers when required.

⁸⁶ House of Commons Select Committee on the Environment (1987) *Pollution of Rivers & Estuaries* (3rd Report) HC 183.

⁸⁷ See, for example, A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994) at p.95 and C. Veljanovski, "Regulatory Enforcement: An Economic Study of the British Factory Inspectorate." (1983) 5 *Law & Policy Quarterly*. 75 at 86 where the author estimates that a prosecution is eight to ten times as costly as a site visit.

⁸⁸ See *Neville v Gardner* [1985] Cr App Rep (S).

⁸⁹ See generally, the House of Lords Select Committee on EC (1989-90) *Paying for Pollution*. 25th Report and both of which discuss cost recovery in detail.

enforcement related costs to be transferred to the party whose pollution is the subject of enforcement action. Costs orders have been held to include not only expenditures directly associated with litigation,⁹⁰ but those of any necessary investigation associated with the case,⁹¹ and, more recently, future costs of projected meetings necessary between the Agency and operator to deal with the consequences of the incident.⁹² It would seem then, that as Environment Agency prosecutions are predominantly successful, the only costs to be borne by the Agency outright relate to the small percentage of acquittals. These few cases can, however, be disproportionately expensive. While the costs of Agency prosecutions may be relatively low as the defendant generally pleads guilty, where heavy penalties are sought, the costs of court action can be exorbitant. For many large corporate defendants, the cost of a conviction in terms of negative publicity cannot be ignored, and these defendants will have the resources to launch a sophisticated legal challenge to an Agency prosecution.⁹³ It is precisely in these cases that defendants vigorously resist conviction by launching a legal attack on Agency enforcement practices or on their interpretation of legislation. This protraction of the litigation process absorbs a disproportionate slice of the Agency's resources. An Agency interviewee gave the example of HMIP's prosecution of *Coalite Ltd* as an illustration of the risks of incurring substantial legal costs in proceedings against multinational defendants. The legal costs of this case, had it been unsuccessful, would have been almost enough to bankrupt HMIP.⁹⁴

There is also evidence that costs orders following environmental prosecutions have not always led to a full transfer of costs to the defendants:

*"The WRA is also experiencing difficulty in recovering the true costs of undertaking prosecutions, and these shortfalls in cost recovery place a direct burden on the County Council wherever direct action is taken."*⁹⁵

Of the 25 prosecution cases attended during this research, a great number involved a challenge against the costs sought by the Agency prosecutor (although only one was successful).⁹⁶ One manager whose company had been prosecuted, commented outside court that the costs claimed were 'outrageous.' Her objection primarily

⁹⁰ For example, the fees of counsel, costs of document preparation and solicitor time.

⁹¹ *R v Associated Octel Co. Ltd* HL [1996] 4 All ER 846.

⁹² *Environment Agency v ICI Chemicals & Polymers* (1998), Warrington Crown Court, ENDS Rep 278 March 1998, p.47.

⁹³ See generally, chapter 5.

⁹⁴ *HMIP v Coalite Products Ltd* (unreported), mentioned at (1996) ENDS Rep 253, pp.48-49.

⁹⁵ Lincolnshire WRA Annual Report 1993-94, p.9.

⁹⁶ This case was later successfully appealed by the Environment Agency.

related to the £124 hourly rate to be paid for the Inspector's time in dealing with the incident. In her view this was surely a cost already accounted for within the subsistence fee of the licence charges, of which the specific site had contributed an annual sum of £18,000 and the company as a whole had paid over £100,000.

In addition to the frequency of costs disputes, which potentially encroach on the principle of full cost transferral to the defendants, the courts themselves tended to under-estimate the cost of officer time. In one case observed during the course of the research, the prosecution referred to the cost of an officer for half a day as £50, a seemingly nominal fee. In another case, the Magistrate felt that £20 was too much to charge for an hour of an officer's time as a witness, and so it was reduced to £10. The author came across some suggestions that such cases lead to the Agency's legal department feeling compelled to reduce costs claimed in order to encourage their acceptance by the court. Another source of underestimating litigation costs, arises from the controversy which attaches to the criminalisation of environmentally damaging activities. Agency staff themselves sometimes consciously under-estimate costs in order to minimise the penalty imposed on strict liability offenders (found not to be careless but nevertheless guilty), with whom they feel some sympathy.⁹⁷ Despite the law's clear preference (as expressed by the court in the *Octel* case and the 'polluter pays' principle) for costs to be fully reimbursed in successful prosecutions, and the overwhelming success rate of Agency prosecutions, court action clearly remains a resource intensive activity.

The CBD, therefore, seems likely to augment the existing preference for compliance strategies of enforcement on the basis that, notwithstanding cost recovery provisions, formal styles of enforcement are extremely costly. Also, as mentioned above, the costs under section 39 include those to *any* person,⁹⁸ and, therefore, may be construed as also requiring consideration of the costs incurred on the defendant's side (for example, the defendant's legal costs, any penalties imposed and any of the Agency's legal costs the defendant may also be liable to pay (as Stigler advocated)). These conclusions are far from hypothetical. An Agency prosecutor commented that larger operators facing court action had informally challenged the Agency's action with the argument that the 'costs' necessary to defend a prosecution would produce greater 'benefits' in improving the

⁹⁷ This point was made by a member of the Agency's legal department.

⁹⁸ Section 56(1) EA 1995.

environment, and that they would undertake such improvements if plans to prosecute were abandoned.⁹⁹

Certainly, prosecution is often viewed by Agency officers as producing 'costs' which are not offset by a corresponding 'benefit.' If 'costs' are to include those expended by a convicted defendant then it seems that the expenditure on the fine, (although producing public 'benefit' in terms of increased Treasury income) because it is not producing a direct 'benefit' in terms of environmental protection, is often perceived as a cost with no corresponding benefit.¹⁰⁰ This argument shows once again that the placement of environmental enforcement in the context of costs and benefits can augment the existing reluctance to engage in court action.

As with the principle of proportionality, it can be argued that cost benefit principles were implicit in the Best Practicable Means/Best Available Technology Not Entailing Excessive Cost concepts which dominated prescribed processes regulation long before the Environment Act 1995.¹⁰¹ Nevertheless, its appearance on the face of the statute as a duty which applies across the Agency's functions (not only IPC) is surely further grounds for the suggestion that the Agency's enforcement style is likely to move closer to the compliance-based culture of the Alkali Inspectorate.

6.7 The Driver of Due Process Guidance: Distortion of Enforcement Priorities?

It was noted earlier that, given the moral ambivalence which still surrounds the Agency's task of taking polluters to the courts, the enforcement principles were likely to be an attempt to use the notions of due process to increase the Agency's legitimacy. Professor Baldwin has remarked on the limitations of the due process claim of legitimacy:

*"There is no guarantee that maximising recognition of individuals' rights will deal with collective or social issues or will produce an efficient decision (it may lead to stagnation and indecision)."*¹⁰²

Evidence has been collected in this chapter which adds testimony to Baldwin's prediction. Indeed, it is argued here that the 'principles of enforcement' in

⁹⁹ September 1998. The prosecutor's view, however, was that accepting such an interpretation of CBD would mean that rich operators would get away with breaking the law and those who couldn't afford lavish remediation projects would be penalised by prosecution.

¹⁰⁰ Interviews with officers. See 3.2.3 (i).

¹⁰¹ See 3.3.2(i).

¹⁰² R. Baldwin, *Rules and Government*. (Clarendon Press, Oxford, 1995) p.44.

recognising individual rights formally, necessarily hobble the Agency's capacity to protect collective interests in the environment. Primarily, these principles direct Agency enforcement away from the tradition of 'bargain and bluff.' From what has already been said concerning the very small likelihood of being taken to court and the frailty of the judicial sanction in environmental regulation,¹⁰³ it is clear that the capacity to 'bluff' is an extremely valuable tool for enforcement agents.

An example of the value of this enforcement tradition of obscuring transparency can be given by looking at the prosecution of strict liability offences. While Agency interviewees tended to justify court action on the grounds of the defendant's culpability, this clearly does not explain the small number of strict liability prosecutions which occur, where in the prosecutor's admission, the defendant has not been negligent.¹⁰⁴ The rights created by the Enforcement Code of Practice under the heading of 'transparency'¹⁰⁵ indicate that transparency is being interpreted as the Agency giving reasons for its decisions to take formal and immediate enforcement action. This need to explain the 'why' of enforcement does not sit easily with the legacy of strict liability prosecutions in environmental regulation where there is no proof of fault or even evidence that the defendant could not have reasonably prevented the breach,¹⁰⁶ it will surely become increasingly difficult to launch a prosecution. Yet strict liability offences put the Environment Agency in a strong bargaining position, for the Agency can fulfil the evidential requirements of prosecution with ease, and, therefore, use the threat of court action in negotiation with a polluter, as a low cost means of securing compliance. The confidence in this regulatory tool, created by the fact that conviction is almost automatic upon prosecution,¹⁰⁷ equips the Agency with an incredibly powerful enforcement device.

¹⁰³ See chapter 2 and later at chapter 8.

¹⁰⁴ One such case was observed in the course of this research (Northwich Magistrates' Court, June 1997). A farmer's silage pollution entered a canal after a purpose-built drainage system was intercepted by an uncharted prehistoric drain under the farmer's land. The silo had been built according to regulations, and great efforts had been made by the farmer to ensure effluent did not travel to the watercourse. The Agency admitted that the defendant had been the model of co-operation and had spent four weeks excavating the fields to find the source of the problem.

¹⁰⁵ See earlier at 6.4.

¹⁰⁶ For example, in *CPC(UK) v National Rivers Authority* CA [1995] Env LR 131 pollution escaped from a fracture in the defendant's plastic piping, but the defendant's conduct was 'exemplary' (at p. 134), the defect being 'latent' and, therefore, not reasonably discoverable on inspection. Likewise, in *National Rivers Authority v Yorkshire Water Services* [1995] HL 2 All ER 225, the defendants were found unable to have reasonably prevented the discharge (pp.228-229). See also *Environment Agency v Brock Plc* [1998] JPL 968 (QBD), confirming the point about fault.

¹⁰⁷ See 2.1.2 where it was noted that the NRA achieved a 96% conviction rate in prosecutions from 1991-94.

Studies such as those conducted by Hawkins and Carson,¹⁰⁸ concluded that unless some element of culpability was present, offences were not generally prosecuted, a finding which was confirmed generally in this research in relation to Agency officers.¹⁰⁹ This supports suggestions that strict liability offences were assumed to be 'over-inclusive,' and therefore not intended to be applied in true 'no-fault' cases. There is little or no remark in such studies of the danger that the regulated population may discover this 'truth' about strict liability for themselves. If operators are not demonstrably careless, if they cover their tracks well, or if they co-operate with the regulator after the event, they are unlikely to be prosecuted. Couple this knowledge with the reality that the offence may never be detected by the Environment Agency, or even traced back to the operator, and the operator's perceptions of the risk of enforcement are significantly altered. The exposed operation of these over-inclusive strict liability offences as being utilised *only* in clear cases of fault, undermines the deterrent value of the law.

The strict liability prosecution can assist the regulator to prevent operators from calculating the likelihood of prosecution.¹¹⁰ The enforcement tradition of infrequent prosecution can only be effective if the regulated population cannot reliably calculate the risk of prosecution. The possibility of prosecution in the absence of fault obscures transparency of regulation and, thereby, facilitates general deterrence. Some support for this proposition arose in an interview with an officer from a water company.¹¹¹ During his recollections of dealings with the National Rivers Authority and the Agency, he recounted how he had plotted prosecutions of the company on a chart measuring degrees of 'culpability' on the company's part and degrees of 'severity' in terms of impact on the environment. The chart showed the incidence of prosecution to be completely unpredictable, and that the water company had been prosecuted as many times for offences of low culpability and low impact as for offences where there was clear neglect and severe impact on the environment. His conclusion was that the operation of the National Rivers Authority's/Environment Agency's prosecution policy was highly unpredictable.

¹⁰⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon, Oxford, 1984) and W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396.

¹⁰⁹ See chapter 3.

¹¹⁰ Literature which asserts that offenders use their perceptions of the likelihood of enforcement (and of the weight of likely penalty) to inform their behaviour includes; I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* 259, G.J. Stigler, "On the Optimal Enforcement of the Law." (1970) *Journal of Political Economy*. 526 and K.I. Wolpin, "An Economic Analysis of Crime and Punishment in England and Wales 1894-1967." (1978) 86 *Journal of Political Economy*. 815.

¹¹¹ August 1998.

By exaggerating both the certainty of formal enforcement and the implications of a prosecution, and by obscuring the operators' predictions of when a prosecution might be taken, the regulator can amplify the perceived threat of enforcement and thereby offset the weaknesses in the system (such as the scarcity of legal action and the reluctance of the courts to sanction). These strategies heighten the bargaining power of the regulator and can be viewed as 'coping mechanisms,' developed to facilitate optimal deterrence. Enforcement in environmental regulation has been based on a tradition of over-inclusive laws accompanied by the strategic use of discretion to obscure transparency in the regulatory regime and to distort the realities of the legal sanction. Principles such as *consistency* and *transparency* in particular threaten to undermine this strategy. By publishing benchmark standards by which enforcement action is to be assessed, the opportunity exists for operators to use these principles to challenge the Agency formally and 'informally.' These policy statements will be of particular use in arguing with the Agency that prosecutions should not be brought or should be dropped.¹¹²

6.8 Summary & Conclusions

However small the role played by enforcement 'rules' and 'guidance' in the environmental enforcement of twenty years ago, that role cannot be ignored in contemporary explorations of regulation. The principles of enforcement discussed here are clearly designed to protect operators from the excesses of regulation, or regulatory unfairness in the exercise of the enforcement function.¹¹³ It has been observed that, the use of 'due process' values is capable of undermining effective regulation:

*"Moreover, the multiple reviews made possible by due process protections impede the prompt application of the sanctions established by law. In a variety of ways, therefore the traditional legal structure of enforcement may well diminish achievement of regulatory goals."*¹¹⁴

In a number of subtle ways, the practical applications of principles such as '*consistency*' and the cost benefit duty appear to affect the balance of power as between regulator and regulated. Whilst the proponents of accountability would argue that discretionary power should not be left unchecked, or that broadly worded

¹¹² The author is not the only one to express such views; see S. Payne. *Environmental Law Update*. (Central Law Training, Autumn, 1999) at 26.

¹¹³ Or at least encourage operators in the belief that they will be protected.

¹¹⁴ E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981), at p.39.

discretion, "*invites chaos*,"¹¹⁵ it has been argued here that there are significant advantages, in the law enforcement context, of retaining the unpredictability of discretion.¹¹⁶ When the reality of the formal law enforcement process is composed of inadequate deterrents capable of encouraging non-compliance,¹¹⁷ strategic use of unbounded discretion can facilitate effective enforcement and fulfilment of the Agency's duty to protect the environment. The foregoing analysis of the four principles of enforcement demonstrates some ways in which their fulfilment may detract attention from the environmental protection function, and undermine the unpredictability of 'irrational' regulation. It seems that the bluffing mechanisms which Hawkins identified, and the bargaining power which this attributed to field officers, are now threatened by the heightened emphasis of transparency and fair regulation.

The subordination of environmental protection objectives to industrial/operator interests is reinforced by the cost benefit duty which appears to incorporate considerations of 'cost to the operator' into enforcement discretion. As the duty to have regard to costs and benefits seems directly applicable to enforcement decision making, it is likely to direct the Agency towards co-operative regulation. The 'costs' of legal enforcement to both the Agency and regulated organisations, far exceed the costs of the less formal methods of 'enforcement' employed in the co-operative/compliance style of enforcement. Both the Enforcement Code of Practice and the Cost Benefit Duty present significant possibilities of increased challenge of Environment Agency enforcement action (via judicial review and other means). While this enhances accountability of the regulator, it can also result in a more defensive style of practice on the basis that doing 'nothing' presents the course of least resistance.

In extreme cases, these enforcement principles may lead to the courts being invited to adjudicate on the legality of the Agency's enforcement practice. The potential for the Agency's due process guidance to increase the likelihood of judicial review against the Agency will be examined in the next chapter.

¹¹⁵ Ibid at p.34.

¹¹⁶ A. Sofaer, "Judicial Control of Informal Discretionary Adjudication and Enforcement." (1972) 72(8) *Colombia Law Review*. 1293, at p.1297.

¹¹⁷ The formal mechanisms of control by criminalisation are historically inadequate in providing effective deterrents. (See chapters 2 and 8 where infrequent prosecution and lenient sentences are highlighted).



Chapter 7

INTER-INSTITUTIONAL DRIVERS I: THE SHADOW OF REVIEW

"....(R)ather than the threat of a shotgun or a lock out, large operators make equally ferocious threats of judicial review or legal challenges. These are very significant to the Agency."

(RSR interviewee, June 1998.)



CHAPTER 7

INTER-INSTITUTIONAL DRIVERS OF ENFORCEMENT I: THE SHADOW OF REVIEW

In the preceding discussion of the Agency's 'due process' guidance, it was noted that such open-textured rules were likely to increase the opportunity for judicial review of Agency enforcement. This chapter aims to assess the potential for such review and examine its implications for enforcement style.

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7.10 Summary and Conclusions

7.1 Introduction

Although Hawkins recognised the role of response to outside constituencies (namely operators and the broader public) in his concept of 'political ambivalence', he laid little emphasis on the impact of inter-institutional relationships as a driver or inhibitor of enforcement style. One inter-institutional factor which has some importance in shaping enforcement style is that of the courts' review function. Just as the threat of prosecution is intended to deter operators from future non-compliance, so the threat of legal challenge in the form of judicial review must logically be capable of affecting a regulator's approach to enforcement.¹ There is little empirical evidence to substantiate this assumption that judicial review and the availability of review must impact on regulatory style. The conclusions of this chapter must, therefore, necessarily be tentative.²

The impact of reviewability on regulatory style may take a number of forms. As will be seen later, judicial review is far more likely to result from positive enforcement action as opposed to enforcement *inaction*. The result of reviewability may, therefore, be to encourage *inaction* as the line of least resistance. The similar suggestion has been made that the threat of review encourages recourse to non-reviewable means of enforcement in order to avoid the threat of intrusive review. In terms of enforcement style, this may well mean a shift away from prosecution and notice-serving as a means of securing compliance. There is at least one case study which provides supporting evidence for this claim. Christopher McCrudden's study

¹ See for example, E. Bardach, & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*. (Temple University Press, New York, 1981), p.35; "Few inspectors and enforcement officials take this possibility of review lightly; most treat legal rejection as embarrassing, a mark of their lack of professionalism."

² R. Baldwin & C. McCrudden, *Regulation and Public Law*. (Weidenfeld & Nicolson, London, 1997) p.57.

of the Commission for Racial Equality concluded that two judicial review decisions had restrictive consequences for the Commission's style of enforcement.³ The Commission's response to these two cases was to alter their enforcement strategy to a less formal enforcement style and to move away from formal investigations and notice serving. The regulatory techniques of bargaining, conciliation and negotiation offered greater security from judicial intervention and became preferred strategies. If two decisions can have such a dramatic effect on an institution, surely then the mere potential for reviewability can impact on regulatory style without any litigation ever needing to be taken. This is even more likely to be the case with an institution such as the Agency, which possesses strong legal departments capable of anticipating the potential for review from afar.

If the availability of review is to be assumed to be capable of impacting on regulatory style, there are grounds for concern that the potential for review of environmental enforcement has been augmented by recent developments. As was discussed earlier, environmental enforcement in the UK has experienced a shift in regulatory climate towards fair and transparent regulation.⁴ This shift is exemplified by the Agency's publication of enforcement policies, which inject principle and structure into enforcement and, which represent a challenge to the traditional discretion-based approach to regulation. It is argued that these 'principles of enforcement' create increased potential for review of enforcement discretion, particularly given their disclosure to the regulated population.

This examination of the impact of reviewability will proceed firstly, by assessing whether the courts' review jurisdiction is capable of striking at the Agency's prosecutorial discretion at all. The next step will be to examine the likelihood of such review being initiated by either operators or the public at large. Once the scope of the threat of review has been made out, an attempt will be made to determine whether the 'principles of enforcement' introduced in 1996 do, in fact, create enhanced reviewability. Finally, this chapter will address the implications of any increased reviewability for the enforcement priority of environmental protection.

³ See C. McCrudden, (1987) *The Commission for Racial Equality: Formal Investigations in the Shadow of Judicial Review*, in R. Baldwin & C. McCrudden, *Regulation and Public Law*. (Weidenfeld & Nicolson, London, 1997), pp.227-266. This conclusion was reached even though only one of the review cases resulted in a Commission decision being interfered with.

⁴ See T. Jewell, & J. Steele, *Law in Environmental Decision-Making*. (Clarendon Press, Oxford, 1998), at p.77 and in T. O'Riordan, & A. Weale, "Administrative Reorganisation Policy Change: The Case of HMIP." (1989) 67 *Public Administration*. 277 at 278.

7.2 The Reviewability of Prosecutorial Discretion

Traditionally, law enforcement bodies have enjoyed almost unfettered discretion as to whether to pursue prosecution against identified offenders. The courts will not generally attack selective prosecution, and when asked the question, 'why pick on me?' they respond that such matters have nothing to do with the courts.⁵ Likewise, the Agency's power to prosecute is discretionary,⁶ but whilst review of this discretion is rare, it remains a real possibility. In *R v General Council of the Bar ex p Percival*⁷, Lord Denning's judgment in *R v Commissioner of Police of the Metropolis ex p Blackburn (No 3)*⁸ was followed, to the effect that the decision of whether to prosecute an individual case was prima facie reviewable. This species of review was recognised as being applicable to any body with a discretionary power of prosecution.⁹

On the same issue of the degree to which the courts would intrude on prosecutorial discretion, the case of *Environment Agency v Stanford*¹⁰ provides further confirmation that the opportunities for challenge of prosecutorial judgement exist, although they are few. Lord Chief Justice Bingham stated:

*"The question whether or not to prosecute is one for the prosecutor....If a prosecutor obtains a conviction in a case which the court feels on reasonable grounds should never have been brought, the court can reflect that conclusion in the penalty it imposes. The circumstances in which it can intervene to stop the prosecution, however, are very limited indeed."*¹¹

This case, whilst emphasising the caution to be exercised before entertaining allegations of abuse of process, clearly recognised a jurisdiction to challenge prosecutorial discretion. Furthermore, the court indicated that such jurisdiction would probably have been exercised on the facts, had the defendants been able to prove a representation or assurance from the Environment Agency that criminal proceedings would not be taken.¹²

⁵ See Parker CJ in *Arrowsmith v Jenkins* [1963] 2QB 561.

⁶ Section 37 Environment Act 1995.

⁷ [1990] 3 All ER 137.

⁸ [1973] 1 QB 241.

⁹ *Ibid.*

¹⁰ [1999] Env L R 286 QBD.

¹¹ *Ibid* at 296-7. This case concerned an application to stay criminal proceedings on the grounds that it was an abuse of process and therefore constituted a collateral challenge using public law principles (as to which see below at 7.3).

¹² *Ibid.* at 292.

Further support for the argument that there is a significant jurisdiction to review Agency enforcement discretion comes from across the Atlantic. Koch argues that in the United States, prosecutorial discretion, although treated as 'unbridled discretion,' possesses no characteristics which make it inherently unreviewable.¹³ He argues that prosecutorial discretion is reviewable provided standards have been set out determining how that discretion is to be exercised. This form of reasoning can be used to argue that applicants seeking review of Environment Agency enforcement decisions are in a stronger position than the applicants seeking review of the prosecutorial discretion of the police in the *Blackburn* case mentioned above, as the police had not published details of their enforcement policies.

Given that the jurisdiction for review of the Agency's prosecutorial discretion exists, who is likely to call upon it? Potential applicants for review of the Environment Agency's enforcement discretion may include:

1. defendants in an Agency prosecution/enforcement action arguing that the action was not lawfully brought. An operator can also challenge the institution of enforcement action against himself, using a collateral challenge (that is, raising as a defence in prosecution proceedings, arguments that the enforcement action should not have been taken)¹⁴;
2. concerned citizens or pressure groups alleging that non-prosecution/non-enforcement is unlawful.¹⁵

¹³ C. Koch, "Judicial Review of Administrative Discretion." (1986) 54 *George Washington Law Review* 469, at p.500.

¹⁴ Some examples of which were discussed at 5.5.

¹⁵ At the time of writing the Health & Safety Executive (HSE) is defending a review action by the family of an employee killed in the workplace. The review action alleges that HSE should have instructed the CPS to prosecute for manslaughter. (Communication with HSE prosecutor September 1998.). This form of review is a type of 'surrogate regulation' which strengthens the criminal sanction by ensuring that lack of action by the regulator does not necessarily mean that no 'enforcement' will take place against non-compliance. The term 'surrogate regulation' was coined in N. Gunningham. *Regulating Workplace Safety: System & Sanctions* (Oxford University Press, Oxford, 1999) pp.408-413.

7.3 Collateral Challenge of Enforcement Decisions¹⁶

In the context of prosecutorial review, the scope for collateral challenge must also be taken into account. A collateral challenge has been defined as the use of administrative law principles in: "*proceedings which are not themselves designed to impeach the validity of some administrative act or order.*"¹⁷ The use, therefore, of the familiar judicial review arguments of unreasonableness, improper purposes and irrelevant considerations, in defence to a prosecution constitutes a collateral challenge. An example of collateral proceedings would be an argument by the defendant in a prosecution that the decision to prosecute was not properly taken. These arguments sometimes take the form of an application for a stay of the prosecution as an abuse of the process of the court.¹⁸

The acceptability of a 'collateral challenge' in an environmental prosecution was confirmed by the Court of Appeal in *R v Etterick & Another*.¹⁹ The use of collateral challenges to enforcement action is, however, severely restricted.²⁰ Lines of inquiry via collateral challenge which involve investigation of the way in which the decision to prosecute was made, are not within the court's jurisdiction.²¹ Judicial review is therefore the only means of exploring such claims. It seems then, that only if a collateral challenge is substantive rather than procedural is it capable of succeeding. Of the cases observed during the course of this research, a small number of defendants did use collateral challenges in criminal prosecutions.²²

¹⁶ Collateral challenges would only be available to defendants in court proceedings.

¹⁷ W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988) p.351.

¹⁸ The law on stay of proceedings is to found in *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42, *R v Humphreys* [1977] AC 1 and *R v Willingsden Justices ex parte Clemmings* (1987) 87 Cr. App R 280.

¹⁹ (1993) Lexis. See also *Attorney General's Reference (No.2 of 1988)* [1990] 1 QB 77, where prosecution for breach of a Waste Management licence condition was successfully challenged by judicial review, pleading the condition to be ultra vires.

²⁰ *R v Wicks* (1995) JP vol. 160 p.46, following *Bugg v DPP* [1993] 2 All ER 815, and now *Diliato v Ealing LBC* QBD [1998] 2 All ER 885.

²¹ See the decision in *R v Wicks*, *ibid*.

²² At chapter 5, although none of them used the specific lines of argument detailed in this chapter. A striking example of a successful collateral challenge is cited at 'Landmark IPC Prosecution Rocks Agency Enforcement Policy,' (1998) *ENDS Report* 286 p.17. The prosecution was dismissed as 'manifestly unfair and oppressive,' and was reported as possibly having wide repercussions for enforcement policy.

7.4 The Source of Challenge

Despite the argument that the jurisdiction to review clearly exists, the argument of some academics that the low incidence of review cases demonstrates that the threat of the courts' review jurisdiction is slight must be answered.²³ As has been mentioned above, the courts' review jurisdiction to challenge prosecutorial discretion may be utilised by an aggrieved operator or by a concerned public citizen or public interest group. Which of these parties presents the greatest threat of review to the Agency?

7.4.1 Likelihood of 'Operator Challenge'

*"Businessmen and corporations resist the law not by physical measures but by doctoring the records, making sophisticated excuses, raising legal defences in court, mounting political attacks, or by complaining to the inspector's bureaucratic supervisors."*²⁴

In chapter 3, evidence was presented which suggested that the form of resistance to enforcement utilised by wealthy operators tended to be legal obstruction rather than physical obstruction,²⁵ and that it was also these operators whose perceived vulnerability to adverse publicity amplified the threat of a prosecution.²⁶ In contrast, prolonged litigation is rarely affordable to the small scale offender. The costs of employing legal counsel to argue that the integrity of the enforcement process has been affected, would often outweigh the penalty.²⁷ Such costs are generally only entertained by the large scale, publicity sensitive, corporate defendants.²⁸ What evidence is there that operators will in practice utilise legal challenge of enforcement practice?²⁹

²³ R. Baldwin & C. McCrudden, *Regulation and Public Law*. (Weidenfeld & Nicolson, London, 1997), p.56.

²⁴ R. Kagan, "On Regulatory Inspectorates and the Police", in K. Hawkins, et al. *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.37-66, at p.47.

²⁵ See 3.2.2 (ii).

²⁶ 3.3.3 (ii).

²⁷ See M. Feeley, *The Process is the Punishment*. (Russell Sage Foundation, London, 1979), at p.30.

²⁸ See the conclusions drawn to this effect in Chapter 6.

²⁹ The reasons for operators seeking review of regulatory decisions have been asserted to be where an ongoing relationship with the regulator may have benefits for the future, publicising their are and as the only formal means of challenging decision central to the operator's business, and most importantly for the purposes of this work, use of review as a bargaining counter in regulatory negotiations. J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.4.

Observation of the specific arguments used in defence and mitigation in these cases revealed that defence counsel often attacked Agency enforcement practices, and sometimes used collateral challenges³⁰ to question the propriety of the prosecution. The prosecution of a large waste management operator serves as an illustration. In addition to several technical attacks on the Agency's sampling regime, the defence also argued that interviews used in the prosecution's evidence were inadmissible. The interviews had been conducted by officers from Cheshire's Waste Regulation Authority (WRA), yet the company responsible was in the jurisdiction of Greater Manchester WRA. The Cheshire based officers, it was argued, had no power to interview waste operators outside the region in which they were appointed.³¹

Other defendants attacked the methods used and reliability of the Agency sample evidence, in order to cast doubts on its validity and reduce the weight to be attached to it by the court, and in the process of so doing, subjected Agency witnesses to hours of cross examination while the evidence was challenged to the smallest detail. Two defendants built their case around this type of argument. The first (not guilty plea) argued that samples used by the prosecution were not 'representative' of the defendant's allegedly unlawful load of waste. One or two grams were sampled from a load of ten tonnes. These were taken from the surface of the load. One third of each load was composed of shredded metal and plastic bins, the pieces of which were too large to feature in a sample of that size.³² This allegedly created prosecution bias in sampling. Counsel also questioned the 'chain of custody'³³ of one sample because a date had been scribbled out and amended on the label of the sample jar. He demanded to know also whether officers conducting sampling for the offence over eighteen months ago, had worn the same clothing at other waste transfer sites, and whether each piece of their equipment had been clean.

These general anecdotes suggest that attack is a popular form of defence in environmental prosecutions. Operators will seize on apparent inconsistencies in enforcement practice to undermine the prosecution, whether by formal challenge by

³⁰ Some examples of collateral challenge were discussed at 5.5.

³¹ Sections 68 and 69 EPA 1990 were relied on for this argument. The court in this case refused to acknowledge such a fine distinction and stated that these regulatory powers were not qualified by geographical limitations.

³² An application was made to disregard this evidence under s.78 of the Criminal Evidence Act 1974 as having an adverse effect on the fairness of proceedings.

³³ Agency procedures require clear written evidence tracing the route of all samples, to ensure traceability at any given time and to preclude allegations of interference.

the use of confrontational styles of mitigation.³⁴ The threat of operator challenge cannot, therefore, be dismissed as trivial.³⁵

7.4.2 Operator Challenge and the Alternative Remedies Argument

Although operators may be willing to combat Agency enforcement with legal challenge, it is possible that they may be obstructed by the 'alternative remedies argument.' The disgruntled operator who is subject to enforcement action, such as the service of enforcement or prohibition notices, the variation, modification or suspension of a licence or even the refusal to grant a licence, has an 'alternative remedy' of statutory appeal to the Secretary of State.³⁶ For judicial review to be barred by an alternative remedy, that remedy must seemingly be equally 'convenient, beneficial and effectual,' as challenge by review.³⁷ As the aforementioned appeals are conducted by an independent adjudicator, are likely to be less costly than review, will be heard by an adjudicator with specialist knowledge, and can on request be given a full hearing³⁸ - it is hard to see how the statutory appeal could be less advantageous than review proceedings. It is very rare for review to be available where statutory appeals are in place.³⁹ However, should an operator seek to challenge a decision to take court action, no such appeal mechanism exists (except as against the court's decision). We have seen that the Agency's Enforcement Code allows the right to object to a decision to prosecute.⁴⁰ This would, however, be unlikely to be considered as 'beneficial and effectual' as review, as it is a hearing before the Agency and not an independent body.

7.4.3 The Likelihood of 'Public Challenge'

There is no provision for the public to 'appeal' against the grant of a licence to pollute, therefore the availability of judicial review is crucial in securing a public

³⁴ A classic and recent example is the case of *R v Hertfordshire County Council ex parte Green Industries* (HL) (2000) *The Times*, February 22nd. The operators were issued with a summons in 1995. Their counter-attack of judicial review proceedings was finally determined in the House of Lords in 2000, and although the review proceedings were ultimately unsuccessful, the summons was dropped long ago and is probably now irretrievable.

³⁵ "It can be anticipated that powerful commercial actors will increasingly seek judicial review in an attempt to affect the operation of regulation by securing strategically important decisions." J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.15.

³⁶ Section 43 EPA 1990 for WM matters, s.91 WRA 1991 for WQ and s.15 EPA 1990 for IPC/RSA matters.

³⁷ Lord Denning in *R v Paddington Valuation Officer ex p. Peachey* [1965] 1 All ER 836 at 840.

³⁸ Subsection 43(2)(c) and s.15(5) EPA 1990.

³⁹ See *R v Birmingham CC ex p Ferrero* [1993] 1 All ER 530.

⁴⁰ 6.4.1.

voice in regulatory decisions.⁴¹ Civil actions in the English legal system also fall short of satisfying a broad right of access to the courts for they only provide environmental protection in so far as it is coextensive with property rights and the right to be protected from personal injury. The right to litigate under the civil system does not extend to the 'unowned environment.'⁴²

In judicial review cases, the doctrine of 'standing' requires applicants to show they are directly affected by the subject of their complaint. In other words, 'uninvolved' citizens are barred from influencing the enforcement of the law by the rules of standing.⁴³ The English courts use the test of 'sufficient interest'⁴⁴ to determine whether a person or group possesses the required standing to challenge the legality of a decision by judicial review. Obviously, as the subject of Environment Agency enforcement action, a defendant will automatically have sufficient interest to bring judicial review proceedings, as they may stand to be deprived of their liberty if convicted.⁴⁵ However, the question of whether a concerned citizen or pressure group representing public rights has standing is far from clear.

The right of the concerned 'resident' to challenge local licensing decisions (particularly planning permissions and environmental licences) has been repeatedly tested, yet, surprisingly, the issue of standing of local members of the public remains unsettled. The two High Court rulings in *R v North Somerset DC ex parte Garnett*⁴⁶ and *R v North Somerset DC ex parte Dixon*⁴⁷ have only added to this uncertainty. Both cases relate to the standing of local residents seeking to challenge the grant of planning permissions to quarry. The applicant in *Garnett* used the parkland subject to proposed quarrying operations for leisure purposes, and had objected to the quarry, but had made no written representations to the planning authority. The High Court held that this was insufficient to establish standing in a

⁴¹ See sections 15 and 43 EPA 1990 and 91 WRA 1991.

⁴² See earlier at 1.1.1. For a case in point, see *Merlin v BNFL* [1990] 2 QB 557, where the refusal to treat house dust as 'property' led to the denial of a civil remedy. This restrictive approach is however arguably modernised in the more recent case of *Blue Circle Industries Plc v Ministry of Defence* [1998] 3 All ER 385. See S. Tromans, 'Nuclear Liabilities and Environmental Damages' (1999) *Environmental Law Review*. 1(1) 59.

⁴³ D. J. Black, 'The Mobilization of Law.' (1983) 2 *Journal of Legal Studies*. 125.

⁴⁴ Section 31(3) Supreme Court Act 1981 provides; "No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates." Also RSC Ord 53 rule 3(7) provides; "The Court shall not grant leave unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates."

⁴⁵ The legislation for most environmental offences authorises the imposition of custodial sentences.

⁴⁶ [1997] *Journal of Planning & Environmental Law* 1015.

⁴⁷ [1997] *Journal of Planning & Environmental Law* 1030.

review application. The same court in *Dixon* treated the applicant as having an interest no greater than the general public,⁴⁸ yet the court held that this gave rise to sufficient standing.⁴⁹

It appears that no meaningful distinction can be made between the facts of these cases, for whilst Mr Dixon was a member of more than one environmental organisation, Ms Garnett was also a member of *Friends of the Earth*. In any case, Mr Dixon's involvement with environmental groups did not seem to be of any significance to the judge.⁵⁰ The difference seems to be more in the approach taken by the court. In *Dixon*, Sedley J stated:

"Public law is not about rights...the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on application for leave, the court's only concern is to ensure that it is not being done for an ill motive." (emphasis added)⁵¹

Standing is here being treated as a preliminary issue, and the requirement of sufficient interest as being designed only to exclude vexatious claimants. Popplewell J in the *Garnett* case emphasised a number of judicial statements which treated standing as a matter of statutory interpretation. The legislation under which the decision was made was to be analysed to determine whether that same legislation expressly or impliedly conferred rights or expectations on persons such as the applicant.⁵² The difference then, is in interpretations of 'sufficient interest' and the function of standing rules; *Dixon* - where the requirement of standing was regarded as excluding only persons with bad motives, and *Garnett* - where standing was regarded as requiring something in the form of a right or expectation. A number of criticisms can be made of the rights-based approach endorsed in *Garnett*. The use of the 'rights' terminology in issues of standing is a misguided attempt to transfer rules from private law into the realms of public law, and thereby produces arbitrary restrictions on the review mechanism. Reliance on 'rights' to give rise to standing is, in any case, inconsistent with the rejection of the legal rights test in the statutory

⁴⁸ *Ibid.* at p.1033.

⁴⁹ *Ibid.* at 1037.

⁵⁰ *Ibid.* at p.1033.

⁵¹ *Ibid.* p.1037.

⁵² [1997] JPL at pp. 1018 and 1026.

standing rules themselves.⁵³ The 'sufficiency' criterion can also be measured against the standing requirement in EC law. Here, citizens with a 'direct interest in the quality of their living environment,' should have access to review courts.⁵⁴ This strongly suggests that local residents are to be granted access to the courts in EC cases. In failing to guarantee access to review for locally affected persons, the *Garnett* construction of 'sufficiency' compares unfavourably with the EC's directness test.⁵⁵

7.4.4 'Public Challenge' and the Alternative Remedies Argument

Whilst there seems to be little standing in the way of review or collateral challenges being raised by operators can the same be said of challenges by the public-spirited citizen or interest group? There are certainly a number of features of review which make private prosecution a more attractive option for addressing non-enforcement by a regulator. First, it is questionable whether the review mechanism can provide a more effective check on enforcement discretion than private litigation, as successful review rarely compels the defendant to take a particular course of action (i.e. by order of mandamus) but more often demands the procedure for decision making should be properly followed.⁵⁶ Moreover, from the concerned citizen or pressure group point of view, the costs of review proceedings are more likely to be prohibitive than a private prosecution. Generally, as with all civil proceedings, the costs will follow the cause. The review applicant will therefore have to pay the costs of both sides if unsuccessful. The court does, however, have some discretion to refrain from ordering costs against an unsuccessful applicant who is acting in the public interest in a case of public importance.⁵⁷

More importantly than these factors, the courts seem to prefer the use of private prosecution to judicial review for the purposes of dealing with failures to enforce.⁵⁸ Is it possible then, that the courts would bar public challenge of the Agency's enforcement discretion on the grounds that the applicant has a more suitable

⁵³ The reforms which resulted in the sufficient interest test were considered to be an improvement and relaxation of the restrictive tests of 'legal rights.' See Craig, P.P. (1994) *Administrative Law*. 3rd Edn. Sweet & Maxwell.

⁵⁴ Fifth EC Environmental Action Programme [1993] O.J. C/38/1. As the directness test is not incorporated into a directive, it is not binding on member states.

⁵⁵ Such restrictive views of standing may also be regarded as potential infringements of article 6 of the European Convention of Human Rights, the right to a fair trial/hearing.

⁵⁶ See Chris Hilson who disagrees, apparently on the ground that private prosecution 'skews' the distribution of enforcement action, or in other words defeats the targeting principle. C.J. Hilson, *Pollution and the Rule of Law* PhD Thesis, (University of Sheffield, 1995), p.165.

⁵⁷ See *R v Inspectorate of Pollution ex parte Greenpeace* CA [1994] 4 All ER 321.

⁵⁸ *Cutts v Southern Water Authority* (1991) Lexis, as mentioned in the previous chapter.

alternative remedy in private prosecution? When striking out the judicial review application in the Canadian case of *Hunter v Saskatchewan*⁵⁹ (where the applicant sought to compel the Environmental Protection Authority to enforce environmental and mining laws against certain companies), the court did consider the availability of private prosecution of those companies to be influential. However, the existence of a rule in English law that judicial review will be refused where alternative remedies have not been pursued, is far from settled.⁶⁰ There is plenty of evidence in fact which disputes specifically, the denial of judicial review where an appeal against the contested decision has not been pursued.⁶¹ Pursuit of all other remedies would, in effect, be an almost final bar to judicial review, given the fact that judicial review applications must be launched within three months of the contested decision.⁶² In the *Blackburn* case itself,⁶³ however, the availability of private prosecution did not disentitle the plaintiff to remedy by way of judicial review on the grounds of an alternative remedy.

Assuming that the availability of private prosecution as an alternative remedy could preclude review of Agency enforcement discretion, private prosecution would have to provide an adequate and suitable remedy. This argument could perhaps then be defeated by arguing that private prosecution by the applicant would not be effective, as the applicant as prosecutor would not have access to sufficient information and evidence to present a sound case (unlike the Agency).⁶⁴ Lack of such evidence may

⁵⁹[1994] 10 WWR 744.

⁶⁰ See obiter dicta in *R v Inland Revenue Comrs ex p Preston* [1985] AC 835 at 852 and *R v Epping & Harlow General Commissioners ex p Goldstraw* [1983] 3 All ER 257 at 262 for suggestions that the rule exists.

⁶¹ See *R v Hillingdon BC ex p Royco Homes Ltd* [1974] 1 QB 720 and *Cooper v Wilson* [1937] 2 KB 309.

⁶² RSC Order 53, rule 4. As Wade comments, such a rule of alternative remedies would be inconsistent with the rule of law which permits illegal administrative action to be challenged in court as soon as it is taken. W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988), p.716.

⁶³ [1968] 1 All ER 729.

⁶⁴ Whilst the prima facie availability of private prosecution in environmental matters is now in place, the 'right' of enforcement must of course be accompanied by provisions which ensure access to the evidence necessary to support court action. Access to the evidence required to prove an offence is dependent on availability of information on operator compliance records and consequently, on the UK's implementation of the 1990 EC Directive on public access to environmental information (90/313 [1990] O.J. L158/56. See *ENDS Rep* Feb 1997, p.35. This directive is likely to be superseded by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, submitted to the Fourth Ministerial Conference on Environment for Europe, Denmark June 1998). Of course, the private citizen does not enjoy the extensive investigative powers possessed by Environment Agency officers, and is heavily dependent on observation and pollution control registers. For an instance of private prosecutors using evidence from the pollution control register, see S. Jackson, "Private Prosecutions under the Control of Pollution Act 1974." (1988) *Environmental Law Bulletin*, p.3. The House of Lords Select Committee on EC recently recommended an information commissioner be established to redress shortcomings in the UK's

suggest however that the applicant does not have a sound basis for his public law challenge either. In this case, the applicant is unwittingly caught in a 'catch-22'. The fact that the judicial review applicant's case is supported by evidence, is proof in itself that the remedy of private prosecution is a viable alternative.

In conclusion, the alternative remedy argument could undermine the challenge of a decision *not* to enforce the law because of the formal availability of private prosecution. Added to this is the obstruction presented by the form of such a challenge which is essentially the attack of a non-decision. We have already referred to 'non-decisions' in the context of enforcement discretion as constituting the largest and most autonomous realm of decision making delegated to enforcement officials.⁶⁵ Such decisions once taken, are rarely reviewed further, and are generally invisible to the public as they leave no mark on public records (e.g. such as the service of a notice, warrant or summons). Any opportunity for challenge therefore exists largely in relation to positive decision making, that is decisions *to* take enforcement action. This form of review is likely to be of little interest to the concerned citizen or pressure groups whose concern is more likely to lie in challenging inertia on the part of regulators. It seems then that there are substantial legal and practical disincentives to the public-spirited citizen or interest group seeking review of Agency decisions.⁶⁶ This type of review is therefore less likely to impact on the Agency's regulatory style than the possibility of operator review.

7.5 The Principles of Enforcement: Increasing the Likelihood of Review

As was mentioned in chapter 6 of this work,⁶⁷ one of the most significant policy shifts which accompanied the introduction of an integrated regulator for the environment was the publication of its detailed enforcement and prosecution policies.⁶⁸ The principles of '*transparency*', '*proportionality*' and '*consistency*' and the Agency's statutory cost benefit duty⁶⁹ clearly promote enhanced accountability and fairness to operators, but in so doing they also open the door to operator review. Both the particular form adopted for the enforcement principles and the

compliance with the Directive. See "Environment Disclosure Call", (1997) *The Guardian*, 4th December.

⁶⁵ See 6.3.1.

⁶⁶ Quaere whether any of these obstacles might provide grounds for challenge under article 6(1) of the European Convention of Human Rights (the right to a fair hearing) as incorporated by the Human Rights Act 1998.

⁶⁷ At 6.1.

⁶⁸ For details of which see Appendix D.

⁶⁹ S.39 Environment Act 1995.

inclusion of the principle of *transparency*, facilitate opportunities for operator review.

7.5.1 The Significance of Rule Type

The choice of rule type can be a particular regulatory policy in itself.⁷⁰ For example, in reiterating principles already well rehearsed as part of general administrative law, the principles of *consistency*,⁷¹ *proportionality*⁷² and *transparency*⁷³ are perhaps no more than a sop to operators, designed to pacify but not to create any substantial change in enforcement practice. Indeed, the fact that the Agency consulted widely on its draft prosecution policies may suggest that the Agency is seeking to avoid alienation of operators in the development of its policies and is adopting a strategy of co-optation of operators.⁷⁴ Nevertheless, the public statement of these principles surely bolsters any arguments that review should be available for inconsistent or disproportionate regulatory activities.⁷⁵ Secondly, the choice of very general guidelines, such as 'proportionality,' 'consistency,' and 'transparency,' tends to suggest that a great deal of flexibility is desired by the rule makers in the application of those guidelines. Very specific rules are often chosen to close the system of regulation by eliminating the courts as potential interpreters of those rules.⁷⁶ If the converse of this statement is true, then the use of very broad rules, such as 'proportionality' and 'consistency,' invite judicial scrutiny of their operation.

7.5.2 Implications of the Principle of Transparency - Increased Reviewability

Research on the predecessor enforcement bodies queried whether environmental prosecution policies were sufficiently public in nature to be admitted as evidence in

⁷⁰ J. Black, "Which Arrow? Rule Type and Regulatory Policy." pp.165-193 in Galligan D. J., (1996) *A Reader in Regulation*

⁷¹ *R v Director General of Electricity Supply ex Parte ScottishPower Plc* (1998) (CA), unreported Lexis 3.2.98.

⁷² *R v Barnsley ex p Hook* [1976] 1 WLR 1052; *DPP v Channel Four* [1993] 2 All ER 517.

⁷³ An expression of this principle can be found in *Kruse v Johnson* [1898] 2 KB 91.

⁷⁴ J. Black, "Which Arrow? Rule Type and Regulatory Policy." pp.165-193 in Galligan D. J., (1996) *A Reader in Regulation* at p.177.

⁷⁵ See J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998) at p.130 where the authors form the view that a regulator's interpretation of regulatory guidance, even if internally created, can give rise to judicial review.

⁷⁶ J. Black, "Which Arrow? Rule Type and Regulatory Policy." pp.165-193 in Galligan D. J., (1996) *A Reader in Regulation*, at p. 176. See also J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.134 where Julia Black discusses the disadvantages of drafting more precise rules.

judicial review proceedings.⁷⁷ Certainly, this would seem to have presented a major obstacle to review proceedings of the regulatory bodies which preceded the Environment Agency. Since the formation of the Agency, however, it can hardly be argued that prosecution policy is not a matter for public scrutiny without flouting the principle of *transparency*. The publication of the code, incorporating the four principles which are to guide enforcement discretion, is, in itself, a direct application of the transparency principle. The fact that *transparency* is one of these principles reinforces any suggestion that Agency enforcement is intended to be accountable and should operate in a manner which facilitates accountability. In the United States, the existence of published guidelines for the exercise of enforcement power, was successfully used to rebut the usual presumption that prosecutorial discretion was unreviewable.⁷⁸ Such a finding was attributed to the intentions of the legislature. Clearly as the Agency's Enforcement Code of Practice also has statutory origins,⁷⁹ the mere fact of the Code's publication may also be used to suggest to the High Court that reviewability was intended by Parliament. The adoption of this principle by the Agency (and of course the fact of the publication of the Agency's enforcement code of practice) can therefore be seen to increase the likelihood of a review of environmental enforcement policy and practice.

Whilst opportunities to challenge the enforcement decisions of the Agency's predecessors existed prior to these developments,⁸⁰ the scope for reviewability of enforcement discretion certainly appears to be enhanced by the new enforcement mandate of the Environment Agency. The following section examines the extent to which potential grounds of judicial review of Agency enforcement action are strengthened by the Environment Act and the Agency's published enforcement policies, specifically:

- 1. Express Statutory Duties;**
- 2. Substantive Legitimate Expectations; and**
- 3. Proportionality**

⁷⁷ C.J. Hilson, *Pollution and the Rule of Law* PhD Thesis, (University of Sheffield, 1995), at p.172.

⁷⁸ See C. Koch, "Judicial Review of Administrative Discretion." (1986) 54 *George Washington Law Review*. 469, pp.499-500, and particularly the case of *Dunlop v Bachowski* 421 U.S. 560 (1975) where the presumption was rebutted.

⁷⁹ It incorporates the principles of Schedule 1 of the Deregulation and Contracting Out Act 1994, see The Environment Agency. *Environment Agency Enforcement Code of Practice - May 1996*. (1996) Published at Sweet & Maxwell's Environmental Law Bulletin, June 1996, p.1.

⁸⁰ Most challenges related to licences rather than to enforcement decisions: see *AG Reference No 2 of 1988* [1990] 1 QB 77 - successful challenge of waste management licence conditions as ultra vires; *Etterick Trout Farm Co. v Secretary of State for the Environment* 1993, CA, lexis 19th October 1993; *R v NRA ex parte Haughey* [1996] Env LR 567.

7.6 Express Duties of the Environment Agency

Express statutory duties can be enforced by the courts if construed as mandatory in their requirements, and provided an individual suffers loss as a direct result of their breach.⁸¹ As *Greenpeace* discovered in their unsuccessful attempts to compel the National Rivers Authority to prosecute *Albright & Wilson*⁸², the power to prosecute contravention of environmental protection legislation is generally discretionary.⁸³ An exception to this is the duty to enforce statutory nuisance laws contained in the Environmental Protection Act 1990, but the subject of these duties is not the Environment Agency but local authorities.⁸⁴ Arguably, this enforcement duty is an anomaly now that local government has less to do with environmental protection than it has ever done, and should perhaps be complemented by similar provisions for the Environment Agency. The possible justification for local authorities being subject to a duty to enforce is that statutory nuisances, by definition, represent an infringement of recognised public or private rights,⁸⁵ and often have immediate public health implications.⁸⁶ As has already been mentioned, the 'rights' to environmental protection recognised by the English courts relate largely only to the 'owned environment.'⁸⁷ The limitation of an enforcement duty to statutory nuisance laws is consistent with the rejection of environmental rights in the 'unowned' environment.

The closest example of an unequivocal enforcement duty imposed on the Environment Agency relates to its waste management functions - that is, the duty to ensure that⁸⁸ conditions of waste management licences are complied with, and that licensed activities do not cause pollution to the environment, harm to human health, or become seriously detrimental to local amenities. There is no parallel duty under the Agency's other inherited areas of pollution control; water and prescribed

⁸¹ W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988) p. 247.

⁸² (1991) 2(9) *Environmental Law Bulletin* 107.

⁸³ Section 37 Environment Act 1995 which states that the 'new (Agency) may also institute criminal proceedings in England and Wales.' CF. the comment made by Ogus that enforcement agencies are invariably under duties to prosecute, A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), 86.

⁸⁴ Sections 79-80 EPA 1990. *R v Carrick DC ex parte Shelley*, QBD [1996] Env L. R. 273 saw the successful judicial review of a local authority's resolution not to serve an abatement notice against polluters of the local beach.

⁸⁵ The definition of a 'nuisance' is an unreasonable interference with a person's use or enjoyment of his land, or some right over or in connection with it, W.V.H. Rogers, *Winfield & Jolowicz on Tort*. 14th ed. (Sweet & Maxwell, London, 1994) p.404.

⁸⁶ See, for example, the statutory nuisances at subsection 79(1) EPA 1990 which include smoke, fumes, gas and dust.

⁸⁷ At 1.1.1 and 7.4.3.

⁸⁸ Section 42 EPA 1990.

processes. In contrast, the duties created by the Environment Act 1995 do not command circumstances *when* powers are to be used but relate more to *how* discretionary powers are to be exercised. Sections 5 and 6 of the 1995 Act create the primary duties of the Agency:

"...the Agency's pollution control powers shall be exercisable to prevent or minimise or remedy or mitigate the effects of pollution to the environment." (section 5)⁸⁹

This duty clearly bears some relation to the issue of enforcement discretion. Powers of the Agency to enforce the criminal law are, therefore, to be exercised so as to *'prevent or minimise or remedy or mitigate the effects of pollution.'* This mandate provides a new 'standard' against which Agency action is to be measured, but one so general as to be unlikely to give rise to successful legal challenge. There is no duty to prevent or minimise pollution but only its effects, this suggests the Agency has a reactive rather than a proactive role to play in environmental protection. As it is the same Agency which on the one hand, actively authorises pollution by the distribution of authorisations, licences and consents, and on the other must minimise the effects of pollution, this reactive role is inherent in the diverse functions of the body itself. The Agency must also:

"...promote to the extent it considers desirable; a) the conservation and enhancement of natural beauty and amenity of inland and coastal waters....b) conservation of flora and fauna....and c) the use of such waters and land for recreational purposes." (section 6)⁹⁰

This subjective duty to 'promote' could probably be fulfilled by the publicity of the above issues and represents a lower requirement than the antecedent duty on the National Rivers Authority, 'to further' which required at least assisting the progress of conservation and enhancement.⁹¹ Once again, this dilution of the statutory duty tends to suggest a reduced emphasis on the proactive role of the Agency.

⁸⁹ Section 5 EA 1995.

⁹⁰ Section 6 relates to the Agency's pollution control functions. S.7 places similar duties on the Secretary of State for the Environment, but does not apply to the functions of pollution control.

⁹¹ Section 16 WRA 1991.

7.6.1 Breach of the Duty to Have Regard to Costs & Benefits

Section 39 of the Environment Act 1995 states that the Agency shall have regard to the likely costs and benefits when deciding whether to exercise its powers (one of its powers is the power to prosecute⁹²). We have already seen that the duty was probably intended by Parliament to be applied to Agency enforcement.⁹³ Given the immense uncertainty which attaches to the application of this duty, it is important to assess how robust it would be in the face of threatened judicial review or collateral challenge. Arguments will be constructed 'for' and 'against' the cost benefit duty as creating opportunities for review.

7.6.2 Cost Benefit Duty: Prima Facie Reviewable?

Senior Enforcement Officers have confirmed⁹⁴ that they are interpreting section 39 as obliging them to have regard to 'costs' and 'benefits' when making the decision of whether to prosecute. The language of the cost benefit duty certainly fits the categories of judicial review very well; for example, the costs and benefits were not properly weighed, relevant costs were ignored or irrelevant benefits were taken account of. But would the cost-benefit duty (CBD) create any true potential for review in the English courts? Notably, Professor Howarth has expressed concern along these lines:

*"From a legal perspective, the need to undertake this analysis as a precursor to action by the Agency may give rise to extensive litigation by industry on the basis that the analysis has not been properly conducted in a particular case. Given the uncertainty as to what is involved, claims of this kind will be extremely difficult to substantiate or rebut."*⁹⁵

Although the then Conservative Government neither admitted nor denied the possibility of cost benefit review of Agency enforcement action, had it been averse to the idea the remedy would have been to insert an ouster clause⁹⁶ into the

⁹² Section 37 Environment Act 1995.

⁹³ At 6.6.

⁹⁴ In interview. Further, one explicitly commented that he felt Magistrates could require them to justify their prosecution by providing evidence of their cost benefit determination (Agency Interview 6.97).

⁹⁵ W. Howarth, "Self-Monitoring, Self-Policing, Self-incrimination and Pollution Law." (1997) 60(2) *Modern Law Review*. 220.

⁹⁶ W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988), pp.719-733.

Environment Act, excluding the courts' jurisdiction from cost benefit decisions. The absence of such a clause, it can be argued, creates a presumption that the English courts do indeed have such a jurisdiction. It is questionable, however, whether the cost benefit duty adds anything to the principle of *proportionality* stated in the Code of Practice, which also requires a balancing exercise between risk and cost.⁹⁷ Although section 39 does create a statutory duty, whereas the principle of *proportionality* exists only as a legitimate expectation. In addition, Koch's argument cited at 7.2, would tend to suggest that mention of the duty on the face of the statute supports the case 'for' reviewability.

English review courts have had little experience of cost benefit clauses. They do however have limited experience of the Best Practicable Means clause - a provision which required that operators use Best Practicable Means to contain their emissions.⁹⁸ The courts have granted successful challenge of review of enforcement action which, 'required excessive capital expenditure,' by the applicant company under the Best Practicable Means provision.⁹⁹ This suggests the courts are not averse to reviewing application of provisions which 'require a balance to be struck between the costs and benefits of pollution control.'¹⁰⁰

The experience of the United States (US) may be of assistance here as the Environmental Protection Agency has worked under cost benefit duties for over twenty years.¹⁰¹ The federal courts in *Concerned Residents of Buck Hill v Grant*¹⁰² recognised a jurisdiction to interfere with decisions under cost benefit duties, and the later case of *American Paper Institute v EPA*¹⁰³ resulted in the successful review of a cost benefit decision of the Agency. The distinct powers of the US courts may however undermine the value of such comparison with regards reviewability.

⁹⁷ See para 13 of the Code.

⁹⁸ See 2.1.1.

⁹⁹ *National Smokeless Fuels v Perriman* - October 1982; Environmental Law.

¹⁰⁰ The definition of Best Practicable Means used in Royal Commission on Environmental Protection. *Air Pollution Control: An Integrated Approach*. (1976) Cmnd 6371, para 16.

¹⁰¹ For this reason, the US experience may be of assistance, particularly as in the 1970s, citizen suits to protect the environment were outnumbered by actions seeking to force the Agency to fulfil its non-discretionary duties. R. Glicksman, and C.H. Schroeder, "EPA and the Courts - 20 years of Law and Politics in Assessing the Environmental Protection Agency After 20 years - Law, Politics and Economics." (1972) *Law and Contemporary Problems* Autumn. p.1.

¹⁰² (1976) 537 F2d 29 (3rd Circuit).

¹⁰³ 660F. 2d 954 (1981 4th Circuit).

7.6.3 Cost Benefit Duty: Inherently Unsuitable for Review

'Cost benefit' review in the English courts is perhaps unlikely when the reluctance of the High Court to interfere with administrative discretion is considered. In *R v Cambridge AHA ex p B*, the Court of Appeal held that decisions of budget allocation for medical treatments were non-justiciable:

*"Difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which the court can make."*¹⁰⁴

This statement demonstrates a deep-seated reluctance on the part of the review courts to interfere with decisions involving anything akin to budgetary considerations, which cost benefit decisions certainly are. Of greater import for this discussion is the fact that this view has recently been approved and applied in the context of law enforcement, where budgetary considerations were accepted as sufficient reason for reducing the policing of livestock transportation demonstrations.¹⁰⁵

Some argument can be made that, quite apart from the reticence of judicial scrutiny of budgetary concerns, the inherent character of the CBD does not lend itself to reviewability. These can be labelled the 'self-defeating' argument and the 'diminutive effect of CBD.' The self-defeating argument is simply that a legal challenge on the basis that the cost benefit duty has not been complied with (at least in individual decisions to prosecute or not to prosecute) would be self defeating. The outcome of successfully challenging an Agency prosecution on the grounds that the benefits of bringing the prosecution did not justify the costs, would be a withdrawal of the case before its conclusion. Such an outcome in itself defeats the cost benefit duty, as much of the 'costs' of the case (counsel's fees, legal department resources, gathering evidence) would have been expended, yet the withdrawal of the case will mean that no 'benefits' are yielded. In this way, the CBD perversely defeats its own use as a legal challenge. This 'self-defeating'

¹⁰⁴ [1995] 2 All ER 129. This case followed a string of authorities including; *R v Secretary of State for Social Services ex parte Walker* (1993) 3 BMLR 32, *Re J (A Minor) (Medical Treatment)* [1992] 4 All ER 614, *R v Secretary of State ex parte Hincks* [1993] 1 BMLR 95.

¹⁰⁵ *R v CC of Sussex ex p International Trader's Ferry Ltd.* [1997] 2 All ER CA 65. See also from the realms of civil liability *Knight v Home Office* [1990] 3 All ER 237, where budgetary constraints were not a complete defence to a negligence suit but allocation was considered a matter for Parliament and not the courts (at p.243).

argument does not quite work where the decision challenged is one *not* to prosecute. Court action is often viewed in a negative vein; it is a step taken when all enforcement efforts have failed and conviction imposes many items of cost on the defendant (adverse publicity, fines, legal costs).¹⁰⁶ The 'benefits' of not prosecuting are the avoidance of all these costs, and the 'costs' of non-prosecution must surely be the loss of deterrent effect which could have been gained by this prosecution. Such costs are rarely explicit and would surely be impossible to quantify. Therefore it would be relatively easy to convince a court that the 'benefits' of non-prosecution outweigh any 'costs'.¹⁰⁷

The second inherent unsuitability argument is that, if the duty to have regard to costs and benefits is taken to its logical conclusion, the Agency may need to take account of 'costs' and 'benefits' when deciding how to perform this very duty. In other words, the duty would be of minimal impact as no great time or expense should be used in making cost-benefit determinations, as this would undermine the essence of the provision itself.¹⁰⁸ This argument is however unsatisfactory as the Environment Act only requires the cost benefit duty to be performed when the Agency is considering how to exercise its 'powers,' the discretionary elements of the Agency's operations. The duty cannot therefore apply to itself, as it is not expressed as a 'power' but as a duty.

It is far from clear whether the cost benefit duty may emerge as a real threat of reviewability. The arguments in support of it being capable of leading to review seem to outweigh those against, although it may do no more than increase the likelihood of a review of the proportionality of the Agency's decision making.¹⁰⁹

¹⁰⁶ See chapter 6 generally.

¹⁰⁷ (Excepting of course that this may involve the courts questioning their own function).

¹⁰⁸ This was a view given by an Agency official when questioned by the researcher. See also Environment Agency. *Taking Account of Costs and Benefits*. (1996) Sustainable Development Series SD3 which seems to contemplate the duty as applying to itself.

¹⁰⁹ The Canadian judgment of *R v Maybrun Mines* (1993) 86 C.C.C. 3d 317. Ontario Court of Appeal suggests that if a regulated industry were to challenge their licence conditions (rather than enforcement action per se) as not complying with the cost benefit duty, such a challenge should be raised at appeal against licence conditions and would not be heard as a defence to a later prosecution for breach of a licence condition. Cost benefit arguments could therefore feature in appeal or judicial review of Agency decisions to grant, refuse or vary environmental licences. The right to initiate this form of review seems to extend to local residents and environmental organisations (See the cases of *R v Inspectorate of Pollution ex parte Greenpeace* [1994] 4 All ER 321, *R v Inspectorate of Pollution ex parte Greenpeace (No 2)* [1994] 4 All ER 329, *Re John Guthrie* [1998] 2 Env. L. R. 128, *R v Environment Agency & Redland Aggregates ex parte Leam*; QBD (1997) 18 March, lexis, *R v Metropolitan Borough of Wirral ex parte Gray*; QBD (1997) 17 December, lexis).

7.7 Substantive Legitimate Expectations

The denial of a legitimate or reasonable expectation can be regarded as an ultra vires act.¹¹⁰ A person or company may have a legitimate expectation of being treated in a particular way by a public body which arises out of a legal right, interest, promise or established practice.¹¹¹ The above does not however represent an exhaustive list of ways in which expectations may arise.¹¹² An example of how these legitimate expectations may operate, can be founded on an anecdote of an abandoned prosecution given by an Agency lawyer. A water company had been charged with offences of water pollution, but sought to rely in defence on an alleged communication with an enforcement officer prior to the incident, that the discharge was authorised.¹¹³ This communication could not be verified by the regulator's records, but good faith was assumed on the part of the defendant and the case was dropped. Had the case continued, this operator may have used this communication to found a collateral challenge. The challenge could take the form that the operator legitimately expected this discharge to be immune from prosecution, and that prosecution practice would be consistent with the officer's oral representations, or that Agency regulation would be 'transparent' in making it clear when he was acting outside legal requirements.¹¹⁴ One of the difficulties of succeeding under the head of legitimate expectations is that upholding such expectations tends to undermine the rule which prohibits application of the estoppel doctrine to the acts of officials.¹¹⁵ Nevertheless, the rule against estoppel seems capable of being overridden where the duty of fairness has been breached.¹¹⁶

7.7.1 Consistency

As a species of review, any duty to act consistently is very serious, as it has the potential to strike at the heart of the decision maker's discretion.¹¹⁷ Paras 18-20 in the Agency's Enforcement Code of Practice state the principle that the Agency will; "*promote consistency...in the exercise of discretion.*" We have seen that the

¹¹⁰ If a legitimate expectation is not fulfilled, this may provide support for an argument that the duty to act fairly has been violated, *Ridge v Baldwin* [1964] AC 40.

¹¹¹ W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988) at p.522.

¹¹² *R v SS for Environment ex parte Nottinghamshire CC* [1986] AC 240 at 249.

¹¹³ The effect of subsection 88(1) WRA 1991 is that such authorisation is a defence to s.85 proceedings.

¹¹⁴ In any case, erroneous official advice can be a good defence to prosecution where had the advice been correct, no charges could have been brought - *Cambridge CC v Rust* [1972] 2 QB 426.

¹¹⁵ *Western Fish Products v Penwith DC* (1978) 38 P&CR 7. See also W. Wade, *Administrative Law*. 6th Edn., (Clarendon Press, Oxford, 1988), p.424.

¹¹⁶ *Lever Finance v Westminster London BC* [1971] 1 QB 222.

¹¹⁷ K. Steyn, "Consistency - A Principle of Public Law?" (1997) 2(1) *Judicial Review* 22 at p.23.

principle of consistency as used in the Code is not intended to require uniformity but rather a 'similar approach.'¹¹⁸ The role of the doctrine of legitimate expectations¹¹⁹ in judicial review has been confirmed as existing beyond any expectations of being consulted or having the right to make representations before certain decisions are taken (known as 'procedural expectations').¹²⁰ It is possible that any unambiguous representation as to future conduct by a public body *may* give rise to a substantive expectation. A challenge of the failure to fulfil that expectation could then be raised by way of judicial review proceedings.¹²¹ Paragraphs 18 to 20 of the Agency's Enforcement Code of Practice make clear and unambiguous representations as to its future enforcement conduct.

Prosecution by the Environment Agency may therefore be open to formal challenge on the basis of *inconsistent* enforcement practices,¹²² given the expectation of consistent treatment arising from the enforcement policy of the Agency.¹²³ This suggestion is not without judicial support. In *R v DPP ex p C*,¹²⁴ Kennedy J was of the view that non-prosecution by the Crown Prosecution Service was reviewable on the grounds of a failure to follow an established policy. Further support for 'consistency' as a standard giving rise to review can be taken from *R v Director General of Electricity Supply ex Parte ScottishPower Plc*¹²⁵ in which the regulator's decision which operated inconsistently between sister companies was quashed as irrational. The *ScottishPower* decision concerned the complex regulation of competitive supply of electricity, to which consistency in order to maintain fair play, is likely to be a central consideration. McHarg¹²⁶ commenting on the impact of this decision, concludes that the case is probably not to be treated as an elucidation of general principle, but a decision heavily influenced by the facts of the case. Nevertheless, the decision does show the judiciary will accept inconsistent

¹¹⁸ At 6.3.

¹¹⁹ The principle of legitimate expectations was founded in *Schmidt v Home Secretary* [1969] 2 Ch 149.

¹²⁰ Op cit at n.116.

¹²¹ See *ex p Mead* [1993] 1 All ER 772 as an example of consistency of prosecutions by the Inland Revenue being challenged.

¹²² *R v Home Secretary ex parte Ruddock* [1987] QB 1 WLR 1482, where a legitimate expectation was created that published criteria for regulating telephone tapping would be observed (obiter). See now also *R v IRC ex parte Unilever* [1996] STC 681.

¹²³ See para 18-20 of the Enforcement Code of Practice. Such suggestion was made by J. Bates, *Examining Water Pollution Law and Regulation in Light of Current Government and EU Policy*. (1997) Paper presented at Water Law Conference, February 1998, Bloomsbury Hotel, London..

¹²⁴ (1994) *The Times*. 7th March.

¹²⁵ (1998) CA Lexis 3.2.98.

¹²⁶ A. McHarg, "A Duty to be Consistent?" (1998) 61(1) *Modern Law Review* 93.

regulation as evidence suggestive of irrationality.¹²⁷ Furthermore, whilst the regulator's legislation in the *ScottishPower* case did not feature a duty to act consistently as between licensees,¹²⁸ in the Agency's case the principle of consistency, (although again not enshrined in statute) has been declared to the world in its published enforcement policies. These are perhaps 'special facts,' which suggest reviewability on the grounds of consistency to be an enhanced possibility in the Agency's case.

7.7.2 *The Right to Reasons*

The Environment Agency Enforcement Practice Guidance for Warranted Officers sets out a policy which gives businesses 'rights' including the right to:

- a) a letter, on request, explaining what needs to be done and why - when warranted officers express an opinion that something should be done - without taking formal action;
- b) the right to a 'minded to' notice and an entitlement to have a point of view heard by the Agency before formal action is taken;¹²⁹ and
- c) when immediate action is taken, the right to a written statement explaining why this is necessary (i.e. why immediate rather than another course of action, and the consequences of failing to take action).¹³⁰

Whilst there is no general duty to give reasons for administrative decisions,¹³¹ the guidance creates further legitimate expectations of a right to be heard ((a) and (c)) and a right to reasons ((b)). Although the above provisions do not create a statutory duty to give reasons for enforcement decisions against businesses, again the stated 'policy' gives rise to a legitimate expectation that the policy will be followed. The justification for requiring reasons is generally that:

¹²⁷ See J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998) at p.59 where Colin Scott criticises the court in the *Scottishpower* case as "overstepping the capacities of the legal system...redefining regulatory activities in ways which are unfamiliar to those operating them."

¹²⁸ Ibid at p. 97.

¹²⁹ Repealed under the new policy (see 6.4.1 and 6.4.2).

¹³⁰ Taken from paragraph 4 of the Enforcement Practice Guide for Warranted Officers, published in The Environment Agency. *Environment Agency Enforcement Code of Practice - May 1996*. (1996) Published at Sweet & Maxwell's Environmental Law Bulletin, June 1996, p.1.

¹³¹ *Cannock Chase DC v Kelly* [1978] 1 WLR 1.

*"...in the absence of reasons it is impossible to determine whether or not there has been an error of law."*¹³²

Clearly then, the provision of a right to reasons contemplates that a failure to give reasons may result in review. In the context of review, the right to reasons has two important consequences. First, a court faced with a failure to provide reasons for immediate enforcement action may require the Agency to take the decision again; and second, if reasons are generally to be given, this gives the court increased ability to scrutinise Agency decision making, and to apply the doctrine of *Wednesbury* unreasonableness¹³³ to their decisions.

7.8 Proportionality of Enforcement Action

This is the first principle of the Environment Agency's expressed enforcement policy,¹³⁴ and is a principle which already exists independently as a ground of judicial review.¹³⁵ The mention of *proportionality* by the enforcement code strengthens arguments that review of enforcement discretion of the Agency ought to be available on the grounds of *proportionality*. The principle examines the relationship between the impact of a decision and the extent to which that impact is justified in terms of the decision maker's legitimate policy objectives.¹³⁶ The presence of *proportionality* in the Agency's enforcement guidance increases the scope for arguing that the particular enforcement tool chosen (e.g. prosecution) was not a proportionate response to the breach by the defendant, when cautions, letters or notices were available. In any case, issues of proportionality are substantive rather than procedural, and could, therefore, be raised either by judicial review or by way of collateral challenge to a prosecution.¹³⁷

It is argued here that proportionality presents no great threat in terms of reviewability of enforcement discretion. Where the decision challenged was one of regulatory *inaction* - not prosecuting or not enforcing, the likelihood of review is extremely small. How can *inaction* be disproportionate? - there is no identifiable impact of inaction - although the effects of continued illegality may impact on

¹³² Sir John Donaldson in *Alexander Machinery v Crabtree* [1974] ICR 120.

¹³³ [1948] 1 KB 223.

¹³⁴ See paras 13-17 of the Enforcement Code.

¹³⁵ See *R v Barnsley ex p Hook* [1976] 1 WLR 1052; *DPP v Channel Four* [1993] 2 All ER 517.

¹³⁶ See G. De Burca, "Proportionality & Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law." (1997) *European Public Law* 3(4) 561, which draws on EC caselaw to arrive at the essence and status of proportionality.

¹³⁷ *Bugg v DPP* [1993] 2 All ER 815.

society, its impact is likely to be so diffuse as to be incapable of measurement. Proportionality is therefore ill-suited to the challenge of inaction. Alternatively, a decision to take a prosecution, perhaps in a strict liability case or involving an incident of low environmental impact, could be attacked on the basis of its being disproportionate if the legitimate aims of court action were clear cut. If retributive or individual deterrence were the only objective, it is possible to conceive of cases where the expense of court action would not be justified when there were less costly and detrimental means of achieving deterrence or where there was no conduct to deter. But the functions of prosecution are not so clear cut and include general deterrence, augmenting the regulator's reputation as a stealthy enforcer, attracting publicity, reinforcing attitudes to criminal conduct and, of course, individual deterrence and retribution. So little is understood about the effectiveness or otherwise of these functions that it would be very difficult to argue that the ends do not justify the means. It could also be argued that a decision to prosecute merely hands over the discretion to sanction the operator to the courts. The exercise of prosecutorial discretion in itself does not produce any impact on the defendant capable of being weighed in a proportionality assessment (although strict liability offences compel the bench to convict). In any case, once an offence is proven, how can bringing it to the attention of the courts be outside the regulator's power, as surely there is a presumption that Parliament intended its laws to be enforced? Arguments of proportionality are therefore more likely to arise in relation to positive regulatory acts producing impact which is discrete and immediate in nature, for example, the issue of prohibition notices or the revocation of operator licences.¹³⁸ Finally, if the principle of proportionality were raised in review against enforcement action, perhaps the critical state of the environment can be used to counteract arguments that such action was disproportionate. The notion that environmental deterioration results from the accumulation of incidents of unlawful pollution which are in themselves minimal, could be used to counteract arguments over the disproportionate nature of enforcement action against offences under the Environmental Protection Act 1990 or the Water Resources Act 1991 which cause none or little perceived damage.¹³⁹

¹³⁸ Indeed, one of the few cases considered to be applying proportionality as an independent head of review concerned revocation; *R v Barnsley MBC ex p Hook* [1976] 1 WLR 1052.

¹³⁹ The Advocate General in the European Court of Justice *Lappell Bank* case (1996) ELB p.4. stated that (for the purposes of the Birds Directive), when considering proportionality arguments, it should be remembered that huge losses in bird habitats were the result of an accumulation of small losses. Therefore the fact that a particular site was small was not a decisive factor in the issue of proportionality when determining whether a site should be preserved from economic development.

Even if the proportionality principle is capable of leading to review, an argument can be advanced that it will not add anything to reviewability that did not already exist within the tried and tested heads of review. Although it is usual to talk of the 'grounds' of review, they are often discussed in terms of varieties in form of a single standard of review: that of 'irrationality.' The measure of irrationality is that the decision reached is so *'unreasonable that no reasonable authority could ever have come to it.'*¹⁴⁰ The language of irrationality, by suggesting that only perverse, outrageous or monstrous decisions will be impugned, can be seen to tolerate a significant margin of error.¹⁴¹ It steps beyond the benchmark of reasonableness and strikes down only those decisions which 'are outside the limits of reason.'¹⁴² As Koch explains, irrationality permits only review which establishes a certain level of risk of error in the decisions challenged, and not error itself.¹⁴³ Certainly, the *ScottishPower* decision, relied on here to support review under the heading of consistency, included a finding that the decision was irrational. The threshold status of irrationality has also been recently confirmed in an enforcement review context in *R v Elmbridge BC ex parte Activeoffice*.¹⁴⁴ In that case it was held that a prosecution could not be successfully challenged unless the action in bringing the prosecution was unreasonable. There are however signs that proportionality may involve something less stringent than the irrationality benchmark:

*"Proportionality and Wednesbury irrationality cannot be regarded as simply co-terminous. Proportionality requires the court to judge the necessity of the action taken as well as whether it was within the range of courses of action that could reasonably be followed. Proportionality can therefore be a more exacting test in some circumstances."*¹⁴⁵

If these recent indications that proportionality reaches beyond the benchmark of irrationality prove to be correct, this suggests that the proportionality standard is a real threat in terms of reviewability of Agency enforcement.¹⁴⁶

¹⁴⁰ Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

¹⁴¹ C. Koch, "Judicial Review of Administrative Discretion." (1986) 54 *George Washington Law Review* 469, at p. 470.

¹⁴² *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131.

¹⁴³ C. Koch, "Judicial Review of Administrative Discretion." (1986) 54 *George Washington Law Review* 469, at p.476.

¹⁴⁴ QBD (1998) January *Environmental Law Bulletin*, p.14.

¹⁴⁵ *R v CC of Sussex ex p. International Trader's Ferry Ltd.* [1997] 2 All ER CA 65. This view of proportionality as reviewing the merits of decisions rather than merely their procedural lawfulness is one also supported by Lord Laird of Irvine "Judges & Decision Makers: The Theory & Practice of Wednesbury Review." (1996) *Public Law*. 59.

¹⁴⁶ The possibility that the Wednesbury standard of review may be regarded as an infringement of Article 6 (the right to a fair trial/hearing) may prompt an extension of existing grounds of review.

7.9 Increased Reviewability: Distorting Enforcement Priorities?

If, as has been suggested here, the Agency's enforcement principles do in fact enhance the potential for reviewability to affect enforcement style, to what extent does such reviewability interfere with the Agency's priority of environmental protection? Hilson & Cram¹⁴⁷ pointed out (in the context of standing) that arguments that reviewability imposes an intolerable burden on the administration are misplaced given the statistical evidence of the infrequency of review cases.¹⁴⁸ Certainly, research suggests that the perceived likelihood of review may be overstated, but as has already been stated, the fact that there are few reported cases does not conclude the matter. The threat of review is real and is capable of having a significant impact on regulatory relationships.¹⁴⁹ Regulatory behaviour may be modified either in the knowledge that review may otherwise be pursued, or in response to explicit threats of review.¹⁵⁰ Statistics are not capable of telling the whole story - only the players can provide a real insight into the impact of reviewability. There are suggestions that the source of Agency regulation has indeed shifted from its field-based workforce to its legal department and that the Agency is risk averse:

*"The Agency does not take into account commercial realities....Officers cannot take decisions, everything is referred to legal and then to the policy division and then to the legal department at Head Office. If we ask them can we do something we are left for such a long time without an answer. There is one person in legal who gets passed all these problems [who] is newly qualified, [and] takes a literal interpretation, a conservative view. That's what the Agency is."*¹⁵¹

¹⁴⁷C.J. Hilson, I. Cram, "Judicial Review & Environmental Law - Is there a Coherent View of standing?" (1996) 16(1) *Legal Studies* 1, at p.4.

¹⁴⁸ Ibid, commenting on M. Sunkin, L. Bridges, and G. Mesazaros, G. *Judicial Review in Perspective - An Investigation of Trends in the Use and Operation of the Judicial Review Procedure in England & Wales*. (London, 1993).

¹⁴⁹ "Regulators are increasingly finding that they are having to defend their decisions in court. The exact nature of the impact of such challenges is difficult to measure, but it cannot fail, at least, to affect the way in which decisions are presented." J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.1.

¹⁵⁰ That threat may take the form of applying for leave for judicial review. Such as threat must be taken seriously, as Julia Black notes that the granting of such leave compares favourably with leave granted to non-regulatory/commercial review (70% as compared with 38%). J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.12.

¹⁵¹ Representative from industry, May 1998.

Applying the Agency's own philosophy of enforcement bargaining,¹⁵² the rate of prosecution/review action need only be fairly low for the threat to be of sufficient weight to induce a modification of enforcement behaviour.¹⁵³

Given that the threat of review cannot be easily dismissed, can it unduly distract the regulator from its environmental protection priority? It is argued here that it can in one of two ways. The first is that substantial threat of enforcement review results in defensive regulation, that is, the distraction of resources and efforts from fundamental regulatory objectives such as environmental protection in order to feed the objective of avoiding litigation.¹⁵⁴ The steps undertaken by the public sector to avoid litigation generally produce delay in the execution of their public duties.¹⁵⁵ Such delays can mean that the state of the environment is jeopardised further as polluting activities are allowed to continue for further periods whilst sufficient evidence is gathered for enforcement action. Delay also means that legalistic enforcement becomes more difficult and is more likely to be abandoned.

While such threatened review may rarely if ever proceed as far as a hearing, the threat is, nevertheless, real. The Agency has received communications from defence lawyers applying these principles to action taken against their corporate client and questioning the propriety of enforcement action in their case.¹⁵⁶ The threat of successful review under these headings may force the Agency to avoid or step down from confrontational dealings with operators.

¹⁵² See chapter 3.

¹⁵³ "The granting of leave may also confer considerable tactical advantages, publicising the applicant's grievance and *perhaps improving its negotiating stance with the regulator*." J. Black, P. Muchlinski & P. Walker, *Commercial Regulation and Judicial Review*. (Hart Publishing, Oxford, 1998), at p.12 (author's own emphasis).

¹⁵⁴ "It is essential to avoid a position in which the agencies are unable to exercise their judgement or are obliged to exercise it in ways that give undue weight to short term or financial cost for fear that they would be unreasonably exposed to challenge in the courts." Standing Committee B, 18th May 1995. The 'defensive practice' argument has been used time and again in the civil courts as justification for a limited immunity for regulatory/policing bodies from negligence litigation; *Hill v Chief Constable of West Yorkshire* [1989] AC 53. The same argument has been used in the recent cases of *Ansell v McDermott* [1993] 143 NLJ 363, *John Munroe v Civil Defence Authority* CA [1997] 2 All ER 865, *OLL v Secretary of State for Transport* [1997] 3 All ER 897. Whilst all the above applied in the context of rescue services, see *Elguzouli Daf v Comr of Police of the Metropolis* CA [1995] 2 WLR 173, where the argument was applied to the civil liability of the Crown Prosecution Service.

¹⁵⁵ *X v Bedfordshire County Council* [1995] 3 All ER 353 HL, at 750 C-H.

¹⁵⁶ Communication with Agency lawyer, September 1998.

7.10 Summary & Conclusions

Hawkins' sociological emphasis in *Environment and Enforcement* obscures the formative importance of enforcement rules in determining the jurisdiction of the regulator and the framework within which such discretion resides. The threat of review posed by the Agency's enforcement mandate, when coupled with the litigious instincts of large scale operators, has the potential to significantly affect the balance of power between regulator and regulatee. Although proof of the status of reviewability as a driver of regulatory style is somewhat limited, it does exist. Anecdotal evidence has been put forward here that suggests that the impact of reviewability exists not only at the level of a regulator's response to real review cases, but also in terms of the threat of review (where the potential for an application exists) and to the more common threat of collateral challenge by prosecuted operators.

The main initiator of legal challenge is not *this time the public at large (as they are substantially hindered from embarking on the review process)* but the operators who are the subject of enforcement action. The impact therefore is to tip the balance in the operators' favour in the struggle for bargaining power. The evidence presented suggests that the Agency ought to take the prospects of such review seriously and the impact of this, as McCrudden suggested, is likely to be a movement away from formal, legalistic styles of enforcement. The enhanced potential for review of prosecutorial discretion provided by the 'principles of enforcement' may, therefore, be responsible for further augmenting the traditional preference for informal, conciliatory forms of regulation and utilising prosecution only as a last resort.

This chapter has also attempted to rebut Hawkins' portrayal of the courts' role in enforcement as diminutive. If we are to accept Hawkins' proposition that prosecution as a 'last resort' has a real impact on operators in terms of increasing compliance, surely it is not performing an unreasonable cognitive leap to conclude that the use of 'review' as a last resort by operators has a significant impact on regulatory behaviour. Whilst the courts are only invited to participate in a minority of enforcement disputes, their potential involvement is of great import for regulatory strategy.

The next driver of enforcement to be examined in this work relates to the Agency's dependence on the courts for credibility as a stealthy enforcer. Given that the

current climate of regulation has undermined the tradition of 'bluffing',¹⁵⁷ it will surely be more important than ever to the Agency that the ultimate sanction of prosecution proves to be a robust deterrent to non-compliant operators.

¹⁵⁷ i.e. threatening sanctions with no true intention of using them, threatening the use of powers which do not exist, playing on the unfamiliarity of court proceedings and referring to sanctions which have never been used. See 1.1.4 and K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984). at pp.61-63.



Chapter 8

INTER-INSTITUTIONAL DRIVERS II: THE FRAILTY OF JUDICIAL SANCTION

"Even the largest fines represent negligible costs for the largest companies. The Agency's largest fine last year represented the equivalent of a £15 fine on someone earning £30,000 a year."

(Ed Gallagher, Chief Executive of the Environment Agency,
1998)



CHAPTER 8

INTER-INSTITUTIONAL DRIVERS II: THE FRAILTY OF JUDICIAL SANCTION

*"...[M]agistrates are regarded as ignorant laymen...Their inability to distinguish between pollution of greater or lesser seriousness leads them, it is thought, to punish many polluters with derisory fines."*¹

The anticipated outcome of prosecuting is likely to have a real impact on the readiness of the Agency to prosecute. If the penalties are likely to be inadequate, the Agency will rarely be willing to expose the impotence of prosecution. This chapter assesses the extent to which weak judicial sanction still plays a part in explaining continued reluctance to prosecute in environmental enforcement. Although this section may seem to be a digression from the theme of enforcement drivers, it is intended to highlight the extent to which enforcement style is bound up with predicted enforcement outcomes.

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- 8.2 Frailty of Judicial Sanction and its Impact on Enforcement Style
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 - 8.3.4 Allocation of Penalty Funds: Failure to Promote Environmental Protection

¹ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p.188.

8.3.5 Lack of Publicity

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8.5 Comment & Conclusions

8.1 Introduction

We have seen that reliance on the compliance style of enforcement continues to dominate enforcement by the Agency, excepting perhaps where the operator is small, unresponsive and not susceptible to persuasion.² For such an enforcement approach to be effective in achieving optimal deterrence, it must generally be accompanied by robust sanctions, which inform the risk assessments of operators.³ Any lack of integrity at the penalty stage of legalistic enforcement is likely to drive regulatory agencies even further away from invoking the formal step of prosecution. If the penalty imposed on the non-compliant operator is not sufficiently robust to motivate particular and general deterrence, the prosecution process will be increasingly seen as rarely cost-effective, and possibly also as a show of the impotence of the regulator.⁴ Hawkins commented on the value regulators placed on the 'posture of invincibility' in the courtroom which makes the regulator credible as a legal authority.⁵ More recently, Slapper and Tombs have emphasised that compliance-based enforcement can only effectively function if the sanctions that are formally at the disposal of the regulators are credible ones.⁶ Additionally, as levels of judicial sanction have been assumed in chapter 5 to reflect the judicially recognised social opprobrium of the offence, the more often companies are subjected to substantial fines, the more these offences are likely to enter the public

² Chapter 3.

³ See, for example, I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* 259 at pp.260-61 and C.G. Veljanovski, "The Economics of Regulatory Enforcement." in K. Hawkins, et al *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.169-91 at p.175. See also F. Pearce, & S. Tombs, "Ideology, Hegemony and Empiricism: Compliance Theories of Regulation," (1990) 30 *British Journal of Criminology*. 423 at 425 and R. Baldwin & C. McCrudden, *Regulation and Public Law*. (Weidenfeld & Nicolson, London, 1997) at 236-8 and the brief discussion in R. Baldwin & C. McCrudden, *Regulation and Public Law*. (Weidenfeld & Nicolson, London, 1997), pp.110-112.

⁴ See K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p. 186 who describes a failed prosecution as a public display of agency impotence which will encourage others to take less care in their pollution arrangements. Baldwin & Cave also note that; 'The need for regulatory legitimacy...runs through the entire regulatory process.' Op cit at n. 2, p.117.

⁵ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) (1984) at 190.

⁶ G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999) at 40.

conscience as 'serious crimes.'⁷ The role of the courts is therefore crucial in the enforcement equation and in the progressive stigmatisation of environmental offences.

8.2 Frailty of Judicial Sanction and its Impact on Enforcement Style

As has already been stated, Hawkins portrayed the role of the courts diminutively in his exploration of enforcement style⁸ and he ignored their role in the enforcement equation. Yet, the behaviour of the courts has a crucial bearing on the confidence enforcers have in the effectiveness of prosecution as a means of achieving compliance. There are a number of other studies which do make a connection between the frailty of judicial sanction and enforcement style. For example, the work of Watchman, Barker and Rowan-Robinson⁹ on the enforcement practices of the Scottish River Purification Boards,¹⁰ portrayed court action as dysfunctional regulatory failure.¹¹ Low prosecution statistics represented an achievement rather than a problem of under-regulation. Central to this viewpoint however, was the perception that prosecution was in any case, generally ineffective.¹² The deterrent value of prosecution was questionable, as the penalties imposed on conviction in the 1980s were so low as to trivialise the legal authority of the regulator. Further support can be added to this portrayal of prosecution as 'regulatory failure', for not only does prosecution often represent a failed attempt to persuade an operator to comply, but also prosecution appears to be a relatively futile process in terms of environmental protection.¹³

⁷ G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999), p.224.

⁸ See 1.3.

⁹ Watchman, Barker and Rowan-Robinson. "River Pollution." *Journal of Planning and Environmental Law*. 674.
674.

¹⁰ These are the Scottish equivalent of River Boards, (which later became the National Rivers Authority), in England and Wales and were responsible for, amongst other things, controlling water pollution.

¹¹ Supported in D. Vogel, *National Styles of Regulation*. (Cornell University Press, Ithaca N.Y., 1986) at p.87 and K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.35: "We don't take people to court just like that. It's a history of problems. We've tried everything with them: negotiation, discussion, etc. When we take them to court it's like saying all the other methods have failed." (field officer).

¹² Professor Cranston's study of consumer protection regulation endorsed this view at R. Cranston, *Regulating Business - Law and Consumer Agencies*. (Macmillan, Social Science Research Council, London, 1979), at p.99.

¹³ Fines paid to the court as a result of criminal prosecution have traditionally been handed to the Treasury and do not directly further the goal of environmental protection. See, for example, s.17 Alkali Works Act 1863, CAP 124.

Professor Cranston's study in the 1970s and 80s focused on the enforcement policies of agencies in Britain whose function was to police consumer protection legislation. A few of his observations concerning prosecution are also of particular note. Once again, Cranston noted that fines were treated as an acceptable business expense, and publicity seemed to have no detrimental impact on sales figures.¹⁴ Unsuccessful prosecutions by the enforcement agency caused not only personal frustration for the officers concerned but also appeared to undermine their capacity to control unlawful activities, deter future prosecutions in deserving cases, and encourage future defendants to raise defences more frequently.¹⁵

The fieldwork conducted by these authors is approaching ten and twenty years old and it is surely possible that in this age of environmental enlightenment, the courts are more vigorous in their censure of environmental offences. This much is indicated by the £300,000 fine received by *ICI* recently¹⁶ and the £4 million fine levied on the Milford Haven Port Authority for its part in the spillage of 140,000 tonnes of oil on the Welsh coast.¹⁷

8.3 Failings of the Judicial Sanction

The current response of the courts to enforcement against environmental offenders can be subjected to a number of criticisms which would tend to reduce regulatory confidence in the judicial penalty as a means of securing compliance;

- inadequate sentences for serious cases,
- the inconsistency of sentencing in like cases ,
- the narrow range of available sanctions,
- the lack of explicit connection between the penalty and the aim of safeguarding the environment and
- the lack of formal guidance for the courts.

Each of the above will be addressed in turn.

¹⁴ R. Cranston, *Regulating Business - Law and Consumer Agencies*. (Macmillan, Social Science Research Council, London, 1979).

¹⁵ Ibid at p. 46 and p.99. See also Watchman, Barker and Rowan-Robinson. " River Pollution." *Journal of Planning and Environmental Law*. 674

and A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994), at p.93 and J. Bugler, *Polluting Britain*. (Penguin, London, 1972), at p.172.

¹⁶ See P. De Prez, "Environment Agency v ICI Chemicals & Polymers." (1998) 10(4) *Environmental Law & Management* 187.

¹⁷ "£4 Million Fine for Oil Spill May Put Port Jobs in Jeopardy." (1999) *The Times*, 16th January.

8.3.1 *Inadequate Sanctions & Discharging the Guilty*

*"Though regulatory law is in general framed to penalize leniently, complaints are sometimes made...that the levels of penalty imposed are themselves derisory."*¹⁸

At the time of Hawkins' study it was certainly felt that judicial penalties were generally inadequate. But in the twenty years since Hawkins' field studies commenced, it is possible that sanctions have escalated to levels which more properly reflect society's condemnation of actual or threatened environmental damage. Certainly, there are signs that fine levels are steadily rising as public awareness increases.¹⁹ The Agency were rarely disappointed by the court's response to their prosecution. All hearings except one out of the 25 cases attended in the course of this research resulted in conviction,²⁰ and speculations of Agency officials, almost without exception, consistently under-estimated the penalties which were ultimately handed down. But there is still a pervasive concern that judicial penalties are not commensurate with the seriousness of the offence and the need to deter future breach. Ed Gallagher, Chief Executive of the Agency has protested at the generally trivial nature of penalties:

*"Even the largest fines represent negligible costs for the largest companies. The Agency's largest fine last year represented the equivalent of a £15 fine on someone earning £30,000 a year."*²¹

The survey discussed in chapter 3 asked officers to rate the importance of the consequences of a regulatory prosecution. It is worth noting that only **20%** felt that the penalty was the most important outcome of a prosecution. This tends to confirm a broad consensus amongst officers that penalties remain trivial. The fact that the threat of prosecution is rarely exercised is perhaps a deliberate attempt to conceal the frailty of the judicial sanction.

It is difficult to justify an argument that penalties are too low without a reliable formula for calculating effective deterrents. It can be observed, however, that courts have been using less than **20%** of their available sentencing powers.²²

¹⁸ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.12.

¹⁹ Ibid.

²⁰ For details of these cases see chapter 5 and Appendices C and F.

²¹ Quoted in Environment Agency. *Environment Action*, bimonthly newsletter, October-November 1997, p.3. See also Hornsby, M. (1998) "Watchdog seeks tougher fines for big polluters." (1998) *The Guardian*, 3rd September, p.3 and "Get Tough Courts Told", (1998) *Environment Action*, October/November Issue 16, p.6.

²² See fig 8.1.

Fig 8.1

**AVERAGE FINES IMPOSED: WATER POLLUTION PROSECUTIONS
NORTHWEST²³**

Year	Average Fine	Percentage of Summary Limit
1995-96	£3593	17.9%
1994-95	£3054	15.27%
1993-94	£3050	15%
1992-93	£2206	11%
1991-92	£1999	9.9%

Hawkins viewed a failed prosecution as a public display of agency impotence which would encourage others to take less care in their pollution arrangements.²⁴ The outcome of a conditional or absolute discharge is likely to have the same effect. The two cases described below provide apt illustration.

a) The Dialysis Case: Dudley

The defendant disposed of used dialysis kits in unmarked bin bags on a plot of waste land. This unlawful deposit was reported to the local enforcement body when children from two neighbouring schools were found sucking on the used dialysis tubing. While as a private individual the defendant may not have been aware of his legal duties, the local hospital authority provided a free collection service to all dialysis users, which the defendant had chosen not to utilise. Charged with disposing of waste in a manner likely to cause pollution of the environment or harm to human health,²⁵ the defendant was convicted, but conditionally discharged. It is thought that this was due to the low income of the defendant.²⁶

²³ These figures were obtained from a database printout provided by the Environment Agency.

²⁴ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at p. 186.

²⁵ See subsection 33(1)(c) of the Environmental Protection Act 1990.

²⁶ Interview with waste management officer, February 1996.

b) Unlicensed Deposit: Cleveland

The defendant had been successfully prosecuted for an unlicensed deposit of controlled waste.²⁷ Notices had been served requiring removal of the waste which was still attracting public complaints. The notice was ignored and the Magistrate required the defendant to pay a daily fine of £2 if the site was not cleared within a month of the hearing. The site was duly cleared (the daily fine therefore not being payable) and according to the WRA; *"the magistrates helpfully imposed a conditional discharge for 2 years to prevent further tipping!"*²⁸

In the years 1997 and 1998, statistics from the Home Office and the Environment Agency show that 4% of companies and 23% of individuals who are the subject of environmental prosecutions are discharged.²⁹ Although the incidence of conditional discharges may seem a matter for concern, it should be given a sense of proportion. Using statistics provided by the North West division of the National Rivers Authority 1989-1996, the rate of discharge was seen to be only 3.6%. This compares with a figure of around 8-10% for Crown Prosecution Service (CPS) cases.³⁰ These discharges are, however, probably due to the majority of CPS offenders being individuals with limited funds as opposed to companies, rather than any ambivalence associated with the offence.

The Home Office recently recognised the general perception that the overall level of fines in environmental prosecutions was too low and referred this category of offences to the Sentencing Advisory Panel. The panel has suggested that the Court of Appeal should formulate sentencing guidelines for such cases and has made certain recommendations as to the form those guidelines should take.³¹ Although it is within the panel's remit to provide information to the Court of Appeal about how expensive or effective sentencing is in this area, the panel's guidance states that its main concern is importing consistency into environmental sentencing. The panel makes no reference to any need to increase generally the average penalties awarded. In fact, the panel's advice comments on the need for a better standard in the

²⁷ See subsection 33(1)(a) EPA 1990.

²⁸ Cleveland WRA Annual Report 1993-94 p.34.

²⁹ Sentencing Advisory Panel. *Advice to the Court of Appeal on the Sentencing of Environmental Offences*. (2000). These statistics cover only prosecution for offences under ss. 23 and 33 of EPA and s.85 of the WRA 1991.

³⁰ *Researching the Discretion to Prosecute*. Sanders, McConville & Leng.

³¹ The Sentencing Advisory Panel was set up under s.81(3) of the Crime and Disorder Act 1998.

presentation of environmental prosecutions and calls upon the Agency to better justify why a heavy penalty is required in any particular case.³²

8.3.2 Inconsistency in Sentencing: The Nottinghamshire Asbestos Cases

*"The magistrates are out of their depth, they just don't deal with these cases. If you go through a red light or through a 30 zone at 40 miles an hour, you know what you are going to get. They deal with this sort of thing every day and they have a tariff that they use and guidelines. With pollution incidents its a lottery - they do what they feel like. Sometimes we've had a bigger fine for a minor incident than for a major one."*³³

The previous lack of central guidance for the lay bench inevitably produces an ad hoc approach to sentencing. An example of inconsistent sentencing practice being used in like cases can be taken from Nottinghamshire Waste Regulation Authority. In 1993-94, a contractor employed to remove asbestos lagging from a factory dumped the hazardous materials in unsealed bags into a skip and then transported them to the next county. The contractor had no licences to perform this operation and had deposited the waste in an unlawful manner.³⁴ He was fined £17,000.³⁵ A year later, a contractor was again charged with a similar offence of removing asbestos lagging without the necessary licences and dumping it in an open yard not authorised to store such waste. Defendants in both cases had been sole traders and both had pleaded guilty. This second incident resulted in a conditional discharge of twelve months.³⁶ After this case, the Waste Regulation Authority made representations to the Lord Chancellor for stronger sentences under environmental protection laws.³⁷

Lack of consistency in penalties once again tends to undermine the deterrent value of a prosecution and a risk averse Agency is likely to lack confidence in the prosecution process. Without an element of consistency, risk tolerant companies would be tempted to reduce pollution abatement expenditure, resulting in a degeneration of the best companies to the standards of the worst.

³² Sentencing Advisory Panel. *Advice to the Court of Appeal on the Sentencing of Environmental Offences*. (2000).

³³ Interviewee from water company, August 1998.

³⁴ According to s.33(1)(a) and possibly 33(1)(c) EPA 1990.

³⁵ Nottinghamshire Waste Regulation Authority Annual Report, (1993-94) p.10.

³⁶ Nottinghamshire Waste Regulation Authority Annual Report, (1993-94) pp.9-10.

³⁷ National Association of Waste Regulation Officers Guidance/ Nottinghamshire Waste Regulation Authority Annual Report, (1994-95) p.10.

The Sentencing Advisory Panel, in its advice to the Court of Appeal on environmental sentencing, sets out specific aggravating factors relating to both culpability and seriousness of the offence, such as; financial motives in committing the offence, recklessness, long lasting impact of the offence or proven impact on the health or animals or humans or on flora.³⁸ Specified mitigating factors include; lack of understanding of the law, an isolated lapse, a generally good environmental record, remedial steps taken as soon as practicable and co-operation with the authorities. There are a number of sentencing issues which the panel's advice makes little attempt to resolve, such as a means of ensuring that financial penalties have equal relative impact on companies on different sizes and whether the formulation of corporate penalties should be based on turnover, profitability or liquidity. The panel's advice is clearly only a preliminary step in ensuring greater consistency in environmental sentencing.

8.3.3 *Fine-Dependent Sanctioning*

*"The threat of prosecution is often more substantial than prosecution...they trot to the Magistrates' Court, plead guilty and get fined £5,000."*³⁹

A further fundamental objection to the present framework suggested by the cases detailed above, is that the existing range of sentencing options is too narrow.⁴⁰ Financial penalties do not prevent a return to 'business as usual' by the defendant as they offer little in the way of control over the defendant's future environmental performance,⁴¹ and there is nothing to prevent the cost to the company being passed to the consumer. Financial penalties may not be appropriate in all cases, but a discharge is arguably a negative response to a proven breach of the law. Under the United States Environmental Sentencing Guidelines,⁴² companies can be placed under probation orders, putting their operations under federal court supervision from periods of one to five years. Violation of a probation order can provoke tighter probationary conditions, re-sentencing of the company or the appointment of

³⁸ Sentencing Advisory Panel. *Advice to the Court of Appeal on the Sentencing of Environmental Offences*. (2000), at paras 6-10.

³⁹ IPC Interviewee, June 1998.

⁴⁰ See, for example, N. Gunningham. *Regulating Workplace Safety: System & Sanctions* (Oxford University Press, Oxford, 1999), pp.256-293 where probation orders, community service and publicity are discussed as being possible penalties applied to companies.

⁴¹ For a fuller discussion of limitations of fines against corporate defendants see B. Fisse, "Recent Developments in Corporate Criminal Law and Corporate Liability" (1990) 13 *University of New South Wales Law Journal*. 1, and a brief summary in R. Baldwin & M. Cave, *Understanding Regulation*. (Oxford University Press, London 1999) pp112-113.

⁴² J. Lemkin, "Deterring Environmental Crime Through Flexible Sentencing." (1976) *California Law Review*. 307.

a master or trustee to control company operations and ensure compliance. In Canada too, courts have the option to impose probationary orders,⁴³ prohibiting or directing future action, directing publication of the facts of conviction, payments for research, community service or requiring any reasonable conditions to be fulfilled.⁴⁴ Probationary orders need not require great financial expenditure but would at least exercise some positive control over future environmental performance of the defendant.⁴⁵ Their terms could, for example, impose a stricter regime for inspection to be paid for by the offender.⁴⁶

Under existing arrangements the Environment Agency has very little power to mandate improvements, but only to require observance of licence conditions. As there are procedural limitations on the variation of these conditions,⁴⁷ and enforcement generally requires court action (which is rarely initiated for breach of licence conditions) the Agency's ability to direct the performance of improvements is limited. Enforcement of probationary orders would offer more direct means of securing environmental improvements in many cases, and provides a partial answer to the difficulties noted earlier of reconciling prosecution with the primary objective of pollution prevention.⁴⁸ However, for judicial supervision of industry's future conduct in relation to the environment to be effective, a specialist bench would perhaps be preferable (an option which was briefly explored at 5.6).

8.3.4 Allocation of Penalty Funds: Failure to Promote Environmental Protection

"Prosecution is a last resort. The fine goes to the Government. If it went into an environmental pot, then I would be more willing to use prosecution. If the defendant is not negligent then I would

⁴³ See section 130 Canadian Environmental Protection Act 1987.

⁴⁴ In the strict liability case of *R v Potocan Mining* (1996) 33 WCB 2d 131, the defendant was convicted of discharging a chemical into the river through a burst pipeline. As no negligence had been proven, the defendant company was given a nominal financial penalty and a probationary order was imposed. The particular order required environmental improvements and the setting up of a trust fund to support a fish habitat. Probationary orders do seem to be available under the IPC regime; see s.26 EPA 1990.

⁴⁵ Australian courts also have the power to use probationary orders (see section 556A Crimes Act 1900) but have so far resisted calls to apply them in environmental prosecutions, regarding them as generally inappropriate to these offences (*Hunter Water Board v State Rail Authority (NSW)* (1992) 75 LGERA 22; *Council of Lake Macquarie v Truewin* (ibid) and *EPA v Dubbo City Council* (1994) LGERA 361).

⁴⁶ G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999), p.215.

⁴⁷ See, for example, Schedule 10 para 7 of WRA 1991 which provides that variation of discharge consents is generally not permissible in the first two years after its grant.

⁴⁸ See 3.2.3 (i).

rather the polluter use the money for putting the pollution right rather than pay a fine to Government. ¹¹⁴⁹

While legal costs of a successful prosecution are recoverable, any fine imposed on the defendant is paid to Her Majesty's Treasury and is not reserved for specific environmental purposes.⁵⁰ It has already been noted that this fact is responsible, at least in part, for some of the discomfort expressed by Agency officers with the use of prosecution as a means of enforcement.⁵¹ As the penalty does not alleviate Agency funding difficulties or address environmental issues, the prosecution itself is often viewed as being at least irrelevant to, and even inconsistent with, the primary objective of preventing environmental damage, and this acts as a disincentive to prosecuting. Indeed, process industries inspectors suggested that the confrontational approach could forfeit opportunities to 'prevent' by consuming resources which could otherwise be used for site inspections.⁵² As the public censure and penalties which attach to prosecution play a part in deterring future non-compliance, prosecution *can* be viewed as serving 'preventative' goals, albeit somewhat remotely. The difficulty is that the operation and effectiveness of deterrence are not particularly susceptible to empirical proof, and this tends to devalue the perceived preventive capacity of court action. A further criticism of the current destination of fines arising out of environmental prosecution is that where the fine is substantial, the locality of the environmental breach is in effect punished twice over. The locality surrounding the environmental incident suffers when its environment and/or residents are damaged or endangered by the incident itself, and perhaps by negative publicity following the incident, and then a second time if heavy penalties on local industry threaten job security.⁵³ This tends to perpetuate existing polarities between wealthy rural areas and poor industrial regions.

An interesting approach is taken in some parts of California where the fine is distributed to enforcement/prosecution agencies involved in the case. This results in a generally vigorous approach to prosecution as success in court can generate

⁴⁹ Water Quality interviewee.

⁵⁰ This has been the case since the very first fines for environmental offences; s.17 Alkali Act 1863, s.28 Alkali Act 1906.

⁵¹ See 3.4.7.

⁵² Kagan also viewed formal enforcement as compromising prevention by jeopardising the co-operative relationship between regulator and regulatee, which was the source of much of the regulator's knowledge of compliance levels. See discussion at 2.3.1 (ii) and R. Kagan & T. Scholz, "The Criminology of the Corporation and Regulatory Enforcement Strategies." in K. Hawkins, et al, *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.67-96.

⁵³ This may become the case in *ICI at Runcorn*, for example, who have been prosecuted five times in just over two years.

revenue exceeding the cost of the legal action.⁵⁴ This excess can be distributed, for example by; equipment grants or clean-up funds where no offender can be identified or pursued.⁵⁵ Private competitive enforcement, whereby the private company or individual who initially reported or prosecuted a violation is rewarded by the fine, has been suggested as a means of increasing the certainty of enforcement. The argument against using the fine in this way is that prosecution becomes a lucrative enterprise and the end result would be over-enforcement.⁵⁶ This criticism was countered by Polinsky, who argued that this approach would lead to less enforcement and not more, as private enforcers would be concerned only with profit and would therefore not undertake any cases where the evidence was less than indisputable, where the law was complicated or where the fine may not provide full reimbursement of the costs of the case.⁵⁷ These considerations would not be of great import under the existing UK framework where costs are awarded, even to private prosecutors, quite separately from the penalty,⁵⁸ and public enforcement by the Agency tends not to engage in litigation where evidence or legal points are likely to cause complications.⁵⁹ Private competitive enforcement would, however, be likely to skew the distribution of enforcement between industries. As each individual enforcer, in contrast to the universal jurisdiction of the Agency, would have limited access to evidence of violations, such a system would be likely to interfere with the principles of '*targeting*' and '*consistency*' which are central to Agency enforcement.⁶⁰ In the current political climate of environmental regulation, where the emphasis has been very much on due process and fair treatment of industry in the application of the regulator's enforcement function,⁶¹ use of private competitive enforcement would be unlikely to gain political support. Legislation enabling the Agency to utilise fines to protect and repair the environment remains, however, an attractive option for making a meaningful connection between prosecution and the environment.

⁵⁴ M.S. Pollock, "Local Prosecution of Environmental Crime." (1992) 22 *Environmental Law (California)*. 1405.

⁵⁵ It should be borne in mind, however, that the regulatory climate of the United States is generally perceived to involve a greater emphasis on stringent formal enforcement (D. Vogel, *National Styles of Regulation*. (Cornell University Press, Ithaca N.Y., 1986), pp.21-23).

⁵⁶ Landes, & R. Posner, "The Private Enforcement of Law." (1974) 4 *Journal of Law & Society*. 1.

⁵⁷ A.M. Polinsky, "Private versus Public Enforcement of Fines." (1980) 9 *Journal of Legal Studies*. 105, at p.127.

⁵⁸ See subsection 17(1) Practice Direction (Crime: costs) [1991] 1 WLR 498.

⁵⁹ See Chapter 5.

⁶⁰ The Environment Agency. *Environment Agency Enforcement Code of Practice - May 1996*. (1996) Published at Sweet & Maxwell's Environmental Law Bulletin, June 1996, p.1. See chapter 5 on these principles.

⁶¹ See chapter 6.

8.3.5 Lack of Publicity

*"The Agency needs to do more 'PR' work to raise environmental awareness and responsibilities with potential polluters."*⁶²

The economic model of deterrence assumes that offenders respond to changes in levels of penalties and enforcement because they have 'perfect foresight' of the likely penalties.⁶³ Clearly then, in order for officers to believe that selective enforcement and infrequent prosecution serve a real and substantial deterrent function, the sanctions which attach to prosecution must be communicated effectively to the regulated population.⁶⁴ Yvonne Brittan's water pollution research in the 1980s⁶⁵ suggested that nearly all direct dischargers sampled possessed some knowledge of the penalties imposed in pollution prosecutions. Brittan concluded that this 'knowledge' was obtained by 'bluffs' used by enforcement officers, rather than from reliable independent sources.⁶⁶ Notably, however, twenty percent of dischargers thought that penalties were 'too low' or 'a joke.'⁶⁷

It is likely that levels of awareness have increased since Brittan's research was carried out.⁶⁸ Today, the results of prosecutions are sometimes reported in the local press, very occasionally the national press, some specialist journals and the Agency's own publication, *'Environment Action.'* Doctor Mehta's recent study of company managers' experience of IPC regulation certainly suggested a substantial increase in awareness of the penalties of prosecution since Brittan's research.⁶⁹ He attributed this perceived shift to the heightened status of environmental issues on the

⁶² EP Manager, October 1997.

⁶³ See for example, Wolpin, K.I. (1978) An Economic Analysis of Crime and Punishment in England and Wales 1894-1967. *Journal of Political Economy*, vol 86 pp815-40, at 824.

⁶⁴ Papers advocating the optimal model of deterrence and the inverse relationship between prosecution frequency and penalty severity include: K.I. Wolpin, "An Economic Analysis of Crime and Punishment in England and Wales 1894-1967." (1978) 86 *Journal of Political Economy*. 815, and I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* 259 and Fen & Veljanovski, "Positive Theory of Regulatory Enforcement." (1988) 98 *Economic Journal* 1055.

⁶⁵ Y. Brittan, *The Impact of Water Pollution Control on Industry - A Case Study of Fifty Dischargers*. (ESRC Centre for Socio-Legal Studies, Oxford, 1984).

⁶⁶ Ibid at pp.76-77. For further details of this strategy see K. Hawkins, "Bargain and Bluff." (1983) *Law & Policy Quarterly*. 35.

⁶⁷ Y. Brittan, *The Impact of Water Pollution Control on Industry - A Case Study of Fifty Dischargers*. (ESRC Centre for Socio-Legal Studies, Oxford, 1984) at page 77.

⁶⁸ See G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999) at 187 where they state "...those who own and control corporations know all too well what is required of them in law and of any likely developments in law and regulation...And they are well aware of any changes in enforcement or sanctioning practices on the part of relevant regulators." This statement is however made without any empirical substantiation.

⁶⁹ A. Mehta, "The Benefits of IPC: Views from Industry" (1998) 10(4) *Environmental Law & Management*. 190.

political agenda. However, the companies regulated by IPC tend to be large companies, often with their own environmental compliance staff.⁷⁰ It is the job of these personnel to understand and anticipate how the law operates, and it is therefore unsurprising that when interviewed they demonstrated a reasonable awareness of penalty levels. Brittan's water quality study included interviews with a number of farmers, whose general awareness of the legal machinery is unlikely to be rated as highly. The different populations of these two studies therefore makes it difficult to draw inferences about respective awareness levels.

Both Brittan and Mehta seemed to be in agreement that the knowledge of those interviewed had sometimes been perpetuated by enforcement officers who would exaggerate the frequency of prosecution and severity of likely penalty.⁷¹ This bluffing exercise is likely to be more effective than to avail companies of the facts, when environmental prosecutions are pursued in around one per cent of incidents⁷² and the fine levels are highly unpredictable.

It seems then, that the only consistent feature of sentencing arrangements in environmental prosecutions has been the lack of principle or policy. From the evidence discussed above, it is difficult to see how the Agency can have much confidence in the judicial penalty as producing adequate deterrence. Weak judicial sanction appears to play a significant role in explaining the Agency's continued reluctance to prosecute. This conclusion is borne out by the fact that the Agency's 1996 draft prosecution policy referred to the '*likelihood of a nominal penalty*' as a factor weighing against prosecution.⁷³

8.4 Prosecution as 'Regulatory Failure'

The frailty of judicial sanction is reflected by the Agency's lack of confidence in the courts as a means of legitimating their authority. Prosecution remains a last resort and this may be partly due to the fact that court action risks exposing the ultimate frailty of the sanction which has underpinned the threat of enforcement wielded by the Agency.

⁷⁰ See 2.2.1 where the tendency of IPC regulatees to be large companies is discussed.

⁷¹ A. Mehta, & K. Hawkins, "IPC & Its Impact: Perspectives from Industry." (1998) 10(1) *Journal of Environmental Law* 10(1) 61, at p.68.

⁷² See the approximated statistics detailed in chapter 2.

⁷³ Environment Agency. *Draft Prosecution Policy* (reproduced in Appendices) September 1996

As another means of testing views of prosecution, Agency officers were surveyed as to their interpretation of the significance of prosecution statistics. This section of the survey did not produce anything approaching a unanimous response, but it is perhaps significant that respondents as a whole identified most strongly with the view that a high prosecution record indicated 'a failure' to achieve enforcement by other means (35%):

*"I don't believe in prosecution for the sake of it. Prosecution is a failure on everyone's part - it means we have not got our message across."*⁷⁴

Similarly, a Select Committee noted the responses of Ms John, representing the Agency, to their questions about enforcement:

*"...prosecutions are an interesting statistic but...in a sense an indication of failure...' because an operator who is prosecuted will have rejected all other attempts to encourage compliance."*⁷⁵

For some officers, prosecution was a desperate attempt to communicate the need for compliance:

*"One defendant washes the dirt off carrots for the supermarkets. The soil to them is just dirty water but in fact it contains manure, pesticides and fertilisers. We prosecute them every time because we can't do anything else. They seem to understand our advice and take it on board, but they never implement it. They have had to pay £23,000 in fines over three years. This is obviously not deterring them. We gave them a list of local consultants to sort out a plan for them, but instead they used the services of two German postgraduate students. They will be prosecuted every time because everything else has failed."*⁷⁶

This is a clear example of the perception of prosecution as a response to enforcement failure. Conversely, only 19% of respondents felt that a high rate of prosecutions demonstrated that the regulator was powerful and successful:⁷⁷

"...Even Merseyside which were considered to be the most proactive WRA due to their prosecution statistics, weren't really proactive. Merseyside simply had the highest rate of violators. In 1985,

⁷⁴ Water Quality interviewee, March 1998.

⁷⁵ House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management* 1997-98 HC 484, at 242.

⁷⁶ Water Quality officer, December 1997.

⁷⁷ Question A3. This attitude is very similar to the 'negative view of enforcement' which Cranston, op cit n.26 identified in consumer protection enforcement and Watchman's conclusions on the view of prosecution held by personnel of the River Purification Boards in Scotland in Watchman, Barker and Rowan-Robinson. "River Pollution." *Journal of Planning and Environmental Law*. 674.

Cheshire WRA began an enforcement squad with two officers. Within a very short time statistics for special waste offences soared. If you don't look for the problem you won't find anything."⁷⁸

These results are far removed from the '*sense of obligation to prosecute*,' observed by some academics in their studies of enforcement.⁷⁹ In the sphere of environmental regulation, prosecution is clearly still perceived as a last resort, a long stop and an indicator, not of fulfilling regulatory obligations but, of having failed to achieve enforcement by ordinary methods. Prosecution is viewed by many enforcement officers as a failure, confirming Hawkins' conclusion that compliance styles of enforcement tended not to value prosecution as a goal.⁸⁰

Many officers were ambivalent about the significance of a high rate of prosecutions, stating that it demonstrated no more than:

"...that the Agency is carrying out a very high volume of work, some of which is successful without prosecution, some of which requires it," or that '*the regulator has adequate resources available.*'"⁸¹

Another officer thought that a high rate of prosecutions reflected an enforcement 'competition' between the Agency's regions. This substantiates views that enforcement statistics are sometimes valued by Agency management for their own sake.⁸² They can be regarded as a public demonstration of the Agency's commitment to its role in enforcing regulation and represent a best effort to measure Agency performance.

This apparent lack of consensus on the significance of prosecution rates may be due in part to the diverse functions of prosecution and therefore an absence of agreement on its ultimate purpose. For example, there was some recognition by a substantial minority of respondents that prosecution served a primarily symbolic function; as a show of strength by the Agency to both regulated industries and the general public (23%).⁸³ Prosecution can serve as a warning to regulated organisations of the consequences of non-compliance. It can also be a defensive

⁷⁸ Waste Management interviewee, June 1997.

⁷⁹ S. Weaver, *Decisions to Prosecute: Organization & Policy in the Antitrust Division*. (MIT Press, Massachusetts, 1977) p.169 in her study of the Antitrust Division of the United States Justice Department.

⁸⁰ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) at pp4-7 and here at 1.1.4.

⁸¹ Survey respondent.

⁸² See C. Diver, "A Theory of Regulatory Enforcement." (1980) 28 *Public Policy*. 257.

⁸³ Question B3.

tactic to counter public criticism, prompting the view that the Agency is '*uncompromising, devoting resources to enforcement.*'⁸⁴

8.5 Comment & Conclusions

Many suggestions have been made in this work that there are several external forces directing the Agency away from formal legalistic enforcement. To these can be added the conclusion of this chapter that the available sanctions on prosecution are unreliable, unascertainable and in some cases impotent. Add to this the predictable finding that only 20% of officers regarded judicial sanction as an important consequence of prosecution and it seems clear that in a great many cases, prosecution will be viewed as impotent in terms of increasing deterrence or compliance, and will therefore be avoided. It is suggested that the frailty of judicial sanction can be used as a further explanation of regulatory officers' reluctance to use legalistic enforcement. Lack of confidence in the judicial sanction plays a small but significant role in inhibiting regulators from formal, court-led enforcement and further confirms regulator's preference for persuasion and negotiation as a more effective means of securing compliance.

Hawkins' model of enforcement did not attribute any importance to the role of the courts. The frailty of judicial sanction is, however, a weak link in the enforcement process, as repeated failures to sanction adequately will perpetuate views that environmental offences are not serious. Indeed, Hawkins himself acknowledged the crucial importance of the laws to be enforced enjoying moral consensus as a platform from which they could be enforced.⁸⁵ The courts cannot however be regarded as wholly responsible for the frailty of judicial sanction. Parliament has provided little in the way of guidance to the courts as to the severity with which environmental offences are to be penalised. This lack of direction means that the courts are likely to have been influenced (adversely in the author's view) by the construction of 'seriousness' and the suitable penalty suggested by defence counsel. Thus, legislative vacuum in the area of sentencing has provided increased scope for the continued trivialisation of these offences (as discussed in chapter 5).

If, as it has been argued here, prosecution as the ultimate sanction does not as yet reliably attract sufficient disbenefits to deter operators and does little in many cases to support the Agency as a credible legal authority can the Agency do anything

⁸⁴ Survey respondent.

⁸⁵ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), pp.12-13.

about it? The Agency appears to attribute low level sanctioning to the inexperience of the magistrates:

*"...there is a variation in the approach taken by magistrates because an individual magistrate may not see many environmental issues coming before them."*⁸⁶

The Sentencing Advisory Panel's advice to the Court of Appeal should go some way towards addressing this inconsistency, although a number of issues are left unresolved by the guidance. Given that the guidance does not in any way compel weightier penalties, another 'solution' would therefore seem to be to increase the frequency of environmental prosecutions thus familiarising and 'educating' magistrates with regard to environmental prosecution and encouraging higher levels of penalty. The positivist school also argue that credibility of the enforcement threat can be increased not only by increasing the sanction but by increasing the certainty of enforcement.⁸⁷ It is argued here that such a strategy must be pursued carefully as its outcome may be to tip the current moral status of these offences the wrong way. For example, Carson's study of the implementation of factory legislation concluded in effect that 'under-enforcement' produced a 'conventionalisation' of this form of unlawful activity, whereby it came to be regarded as commonplace and unremarkable.⁸⁸ Yet, 'conventionalisation' can equally occur as the result of 'over-enforcement.' If, for example, environmental prosecutions were much more frequent than at present, then it wouldn't be long before each company had a string of five or ten convictions, making it increasingly difficult for clients, financial institutions and the public to identify those companies which present an unacceptable environmental risk.⁸⁹ There seems, for example, to be a margin of tolerance developing already on the issue of how many prosecutions is acceptable between industries:

*"The big companies, the ICI and the Zeneca, they understand. They know that only one prosecution - that's pretty good. Even three prosecutions for X Ltd would probably be okay."*⁹⁰

This tolerance is likely to surface not only in the context of monitoring in industrial relationships, but also more broadly in the context of the public's perception of environmental wrongdoing, and consequently in the lower courts. A policy of

⁸⁶ A response by Dr Leinster speaking on behalf of the Agency to a Select Committee when questioned about prosecution. House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, *Sustainable Waste Management*. 1997-98 HC 484, at 245.

⁸⁷ A point made earlier at 1.3

⁸⁸ W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396.

⁸⁹ Relying as they do on register entries, 7.4.4.

⁹⁰ Representative from waste management industry, May 1998.

routine prosecution, in suggesting that offending is a necessary incident of trading, is likely to lend support to operators' arguments in mitigation, that their offence was an *unavoidable accident* and *happens all the time*.⁹¹ The result of routine prosecution may ultimately be the further weakening of judicial sanctions, to an extent which, far from deterring non-compliance, in fact encourages it.

The Agency's reluctance to pursue increasing levels of prosecution cannot therefore be seen simply as decriminalisation of corporate offending⁹², or as a reflection of the Agency's apathy.⁹³ Decisions concerning prosecution strategy are far more complex than either of these views acknowledges and must be seen against the backdrop of the social and political factors discussed in this work which inhibit the use of sanctioning strategies of enforcement.

Thus far, this research has largely confirmed Hawkins' portrayal of enforcement as the monopoly of the state regulators and regulatory behaviour as predetermined by external social forces. The next chapter attempts to conclude the issue of 'penalties' by looking at the increased role of extra judicial sanctions in enforcement. This chapter will further update Hawkins' model of enforcement by challenging his notions of enforcement as a deterministic monopoly.

⁹¹ See earlier at 5.4.

⁹² C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993), discussed in chapter one.

⁹³ Although this is commonly the media's interpretation, see 2.4.



Chapter 9

BEYOND JUDICIAL SANCTION

"The British system of law....does not traditionally rely on the very heavy penalty as the main deterrent. It relies rather on persuasion and the belief that especially to industrial firms it is the disgrace that counts and not the fine."

House of Commons Select Committee on the Environment
(1987) *Pollution of Rivers & Estuaries* (3rd Report) HC 183.



CHAPTER 9

BEYOND JUDICIAL SANCTION: THE NEGATIVE IMPACT OF CONVICTION FOR ENVIRONMENTAL OFFENCES

On the whole, this research has tended to confirm Hawkins' portrayal of regulatory enforcement as the monopoly of state regulators, and of enforcement style as predetermined by social forces rather than the independent will of the regulator. This chapter assesses the extent to which notions of 'mutual enforcement' or extra judicial sanctions can be used to modernise Hawkins' model.

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9.1 Introduction

Regulatory enforcement of environmental controls has typically been associated with the 'compliance-based' style of enforcement; that is, infrequent prosecution and informally applied inducements to comply.¹ If this compliance style of enforcement is to be relied upon to produce optimal deterrence, surely then sanctioning must be sufficiently robust to ensure that the threat of sanction is effective.² Yet, as has been seen in the last chapter, sentencing for environmental offences can rarely be regarded as robust, given the narrow range of sanctions, the lack of formal guidance for the courts,³ the inconsistency of sentencing in like cases⁴ and the lack of explicit connection between the penalty and the enforcement aim of safeguarding the environment.⁵ Given that, generally speaking, the fines levied on polluters are still considered to be too small to adequately deter non-compliance,⁶ can it be confidently argued that this inadequacy is now being increasingly offset by the 'disgrace' and other negative impacts of conviction beyond the judicial sanction? It should now be clear that the effectiveness of the continued use of informal styles of enforcement depends on judicial penalties being augmented by some other form of sanction.

The purpose of this chapter is to explore this issue of mutual enforcement⁷, first, by describing in brief academic thinking on this issue, and secondly, by examining in turn the extra-judicial mechanisms by which society's censure of polluting activities is administered.

¹ See generally the works of J. Bugler, *Polluting Britain*. (Penguin, London, 1972), D. Vogel, *National Styles of Regulation*. (Cornell University Press, New York, 1986), A. Ogus, et al., *Policing Pollution: A Study of Regulation and Enforcement*. (Oxford University Press, Oxford, 1982), and K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984).

² This is the prediction of the optimal model of deterrence as outlined in Fen & Veljanovski, "Positive Theory of Regulatory Enforcement" (1988) vol 98 *Economic Journal* 1055-70, I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement" (1972) 1 *Journal of Legal Studies* 259-76 and K. I. Wolpin, "An Economic Analysis of Crime and Punishment in England and Wales 1894-1967" (1978) 86 *Journal of Political Economy*, 815-40. The assumption was made explicitly by A. Ogus, *Regulation: Legal Form and Economic Theory*. (Oxford University Press, Oxford, 1994) 93, where he considers the evidence shows entirely the opposite; that regulatory offences are characterised by low levels of both enforcement and penalty.

³ See Editor's note at 'Sentencing for Environmental Offences' (1996) 8(2) *Journal of Environmental Law* 389.

⁴ H. Croall, "Sentencing the Business Offender" (1991) 30(4) *The Howard Journal*. 280, at 286.

⁵ This criticism was particularly prominent in the author's interviews with Agency officers due to the fact that the fine goes to the treasury rather than into a fund for environmental remediation.

⁶ See, for example, 'Low fines for two more water offences by English China Clays' (1998) *ENDS Rep* 286, p.48, 'Major spills but low fines for ICI, Shell' (1998) *ENDS Rep* 285, 49, 'Scotland's Feeble Fines for industrial pollution' (1998) *ENDS Rep* 285, p.37.

⁷ The term 'mutual enforcement' was introduced at 1.3.

9.2 Beyond Judicial Sanction

As has already been stated,⁸ the penalties associated with environmental prosecution are increasingly assumed to extend beyond those imposed by the court,⁹ and include adverse publicity and certain commercial disadvantages, such as the forfeiture of lucrative contracts, the removal of environmental management systems' accreditation¹⁰ or retraction of financial support. The original intention behind attaching criminal status to regulatory non-compliance was to drive a shift in attitudes towards the prohibited activities. The result of this shift is that social condemnation of the criminalised conduct becomes a deterrent and a penalty in itself. However, Paulus concluded that the process by which 'new' offences became 'stigmatised' by their designation as unlawful was exceedingly slow, as a degree of consensus in society must be given time to develop towards the act constituting the offence.¹¹ The means by which social condemnation crystallises into financial implications for the corporate offender (usually in the form of withdrawal of patronage or other commercial advantage) will be referred to in this thesis using Blowers' term of 'mutual enforcement.'¹²

Can it be said that now, at the beginning of the 21st century, the prerequisite level of consensus has been reached, so that environmental offences truly attract the condemnation of society? How real and substantial are the mutual enforcement mechanisms which are attached to environmental prosecution, and to what extent has the ideological role of the law¹³ succeeded in extending the reach of stigmatisation into an operator's public and commercial relationships? The following discussion of mutual enforcement mechanisms will focus on those extra-legal penalties which may arise first, out of a poor compliance record, and, secondly, from convictions for environmental offences. (There is, of course, a significant degree of overlap between these two dimensions of mutual enforcement).

⁸ At 3.3.3.

⁹ See generally on this, M. Feeley *The Process is the Punishment* (Russell Sage Foundation, London, 1979) 30, where the author states; 'the time, effort and opportunities lost as a result of being caught up in the (court) system can quickly come to outweigh the penalty.'

¹⁰ For example, *ISO 9000* or *BS57750*.

¹¹ I. Paulus, *The Search for Pure Food*. (Martin Robertson, Law In Society Series, London, 1974).

¹² A term used similarly in A. Blowers, *Something in the Air - Corporate Power and the Environment* (Harper & Row, London, 1984).

¹³ That is, its role in changing attitudes in society. The following works engage in some analysis of the ideological role of the criminal law; S. Shute, 'The Place of Public Opinion in Sentencing Law' (1998) *Crim Law Review* 465, particularly discussion of the case of *Sargeant* (1974) 60 Cr App R 74, where the Court of Appeal held that it was the courts' duty to lead public opinion, at p.77, C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993) pp.15-16.

9.3 Public Shaming and the Impact of Register Entries

The Agency's recent strategy of 'naming and shaming' operators with poor compliance records illustrates the Agency's own assumption that the stigma arising out of a court case or publicity for non-compliance is a valuable deterrent.¹⁴ The notion of corporate shame as a free-standing deterrent is, however, untenable.¹⁵ As Tench commented, when arguing for decriminalisation in another field of regulatory offences:

*"It is not likely that a trader will be unable to hold up his head in the local chamber of commerce, if it becomes known that he had been 'done' under the Trades Descriptions Act."*¹⁶

Adverse publicity, on the other hand, has a potential impact on an operator's profits. When surveyed, **49%** of Agency officers indicated that they felt adverse publicity to be the most important consequence of a prosecution. This is to be compared with **20%** who felt that the fine was the most important element of prosecution.¹⁷ In the sector of the Agency which regulates the large scale chemicals industries,¹⁸ this distinction was more pronounced, with **76%** of officers rating adverse publicity as of greatest importance and only **5%** preferring the importance of the penalty imposed by the court. If the publicity attracted by conviction does have a negative impact on the public perception of that company, and thereby on profitability, then there may be real grounds for confidence in the criminal sanction, despite the often trifling fines imposed and generally low levels of enforcement.¹⁹

¹⁴ See 'The Hall of Shame,' (1999) *The Times*, 22 March (which provides a list of the top ten polluters).

¹⁵ Although Ayres and Braithwaite assert that a company's reputation is valued as a good in itself. I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992), p.22.

¹⁶ *Towards a Middle System of Law*. (1982), Consumers Association pp.xix-xx.

¹⁷ Only 8% rated shame or embarrassment as the most important factor.

¹⁸ Integrated Pollution Control - the regime set up by Part I of the Environmental Protection Act 1990 which regulates the processes which have the potential for the greatest environmental hazards.

¹⁹ See G. Slapper, & S. Tombs, *Corporate Crime*. (Longman, London, 1999), p.216 for a summary of arguments against adverse publicity being applied as a sanction.

9.3.1 Broadcasting Poor Compliance

If adverse publicity is to constitute a real sanction, it is essential that non-compliance is in fact publicised. Can it be assumed that a corporate conviction will be publicised by the Agency? Each of the eight regions of the Agency has a Public Relations' office which issues press releases for almost every prosecution and prohibition notice.²⁰ The department is fairly proactive and distributes such press releases to a list of around forty publications.²¹ These forms of publicity are, however, vulnerable to fluctuations in press and public interest. Whilst newspapers may be routinely given access to information on Agency prosecutions, they will not publish them if more sensational stories are available for publication. Direct news coverage is therefore likely to be largely restricted to specialist publications. There are few independent publicity mechanisms used by the Agency, such as employing its own journalists. The Agency does, however, distribute its own newspaper on request, which publishes details of recent Agency prosecutions.²²

Possibly a more powerful form of publicity is the enhanced role of public registers under modern legislation. Any member of the public is entitled to search waste management, water quality and Integrated Pollution Control (IPC) registers,²³ thereby gaining direct access to 'compliance entries' (particularly in IPC, where the register records all reported breaches of IPC authorisation)²⁴ and 'enforcement entries' (detailing notices, cautions and prosecutions brought by the Agency).²⁵ These register entries represent a form of corporate accountability, as the public, not unsurprisingly, view the entries as a measure of environmental performance. An interviewee from a large chemicals plant gave his view of the unfairness of publicised breaches of IPC authorisations:

"We have a poor record for compliance on this site - our IPC compliance is poor but for very good reasons. It is important to understand these reasons. [We] had 30 consents to discharge into

²⁰The publicity machine within the Agency is a two tier process. The decision to publicise a court case is first taken by the legal department who single out cases and then send them to the Agency Press Office who have the final say.

²¹ Interview with Agency officer, May 1998.

²² The bimonthly publication 'Environment Action.'

²³ The provisions are as follows; s.20 EPA 1990 for IPC, s.64 EPA for waste management and for water quality, s.190 WRA 1991, for waste management.

²⁴ S.20(1)(g) EPA which requires information obtained or furnished in pursuance of authorisation conditions to be on the register. Most IPC authorisations require that all breaches of its condition be reported to the Agency.

²⁵ Ss. 20(1)(c), (f) and 64(1)(e), (h), (i) EPA 1990 and s.190(1)(f) respectively.

[the] canal, and we conducted 20,000 tests per year to check our compliance with these consents....The [pre-Agency regulator]²⁶ would drive for 95 per cent compliance with consent conditions, hoping for 100 per cent and, as soon as [we] got near 100 per cent, they would tighten the standard and drive us up further. When IPC authorisations came in, those consents were merely lifted and put into the IPC authorisations. The consents already had very tight conditions, and the legislation had now changed. We still have to do 20,000 tests a year, but every one of the tests that represents a failure now has to appear on the register...the legislation changed overnight and it took some time to get used to. We are not there yet."²⁷

Register entries are clearly a potentially valuable tool in crystallising pressures to make site and operational improvements. It seems, however, that the registers expose a deficit between legal limits and expected levels of compliance; a deficit which has been construed by onlookers as indicating operational incompetence and lethargic regulation.²⁸ Yet this 'compliance deficit' which appears on the IPC register is, it seems, an integral part of the enforcement process, as the regulator anticipates a margin of non-compliance and uses this to keep operators moving towards improved compliance. The compliance deficit may therefore reveal more about regulatory practice and expectations than about operator commitment to compliance. The usefulness and likely impact of these register entries will be discussed further below.

9.3.2 Reliability of Register Entries as a Measure of Compliance

Aside from the issue of the compliance deficit being a product of the enforcement process, are register entries a reliable mechanism of corporate accountability? Industry's argument is that entries showing levels of compliance with authorisation conditions ('compliance entries') do not present an accurate measure of environmental performance:

²⁶ The National Rivers Authority. This body had responsibility for regulating the majority of discharges to controlled waters under the Water Resources Act 1991, but the gradual implementation of the regime of Integrated Pollution Control (Part I of the Environmental Protection Act 1990) meant that large scale/high pollution risks were taken out of the NRA's jurisdiction.

²⁷ Interviewee from industry, October 1998. Details on file with the author.

²⁸ See J. Burke et al, "Revealed: The Chemical Giants Polluting Britain." (1997) *The Sunday Times*, June 1st, p.1, where such inferences are drawn from the number of recorded breaches at ICI's Merseyside plant.

*"Environmental performance is not to be confused with compliance. The environmental performance of the...site is good - we have much to be proud of....Compliance with IPC authorisations is only one aspect or one measure of environmental performance. It is important because they are the measures by which the public judge us, but the most important measure is whether we have an impact on the environment."*²⁹

Clearly, the number of infractions which appear on the register will be influenced by the size of the plant and by how strict authorisation limits are. The numbers of breaches should not therefore be considered as absolutes for the purposes of comparison with companies of different sizes, or with companies regulated by different regions of the Agency.

Perhaps then, records of notices and prosecutions ('enforcement entries') alone would be a better representation of environmental performance, as the Agency only *generally* appears to take enforcement action at 'problem' sites or where there is some shortcoming on the part of the operator. If, however, enforcement entries were to be used as the sole indicators of operator performance, any bias or reticence by the regulator in taking enforcement action would be disguised by the register entries. Public registers should be capable of providing a fuller picture of compliance than merely identifying those breaches against which the Agency has chosen to take enforcement action, particularly as register entries often form the basis of independent enforcement such as private prosecutions.³⁰ Further, by recording compliance statistics alongside enforcement action taken by the Agency, the registers provide a record of enforcement performance against the backdrop of compliance levels and are therefore a valuable mechanism of regulatory accountability.

9.3.3 Register Entries & Public Inspection

Whilst the use of 'compliance entries' and 'enforcement entries' is not perfect, it is preferable to having either form of data recorded separately as it currently provides some measure of both corporate and regulatory accountability. If we can assume then that register entries offer a *reasonably* reliable measure of corporate

²⁹ Interviewee from industry, October 1998. Interviewee's own emphasis. Details of these interviews are on file with the author.

³⁰ See S. Jackson, "Private Prosecutions under the Control of Pollution Act 1974." (1988) *Environmental Law Bulletin*, p.3

compliance, can it be said that they are actually put to use? Agency officers appear to view entry of an enforcement notice or caution on the register as a penalty, on the assumption that registers are viewed by the public. One officer said of cautions; *'It is more than a slap on the wrist. The public are entitled to see the formal cautions register and the caution is there for three years.'*³¹

As that officer indicated, registers may be used by the public to assess the legality of a site's operations with a view to private prosecution, or by the finance sector to assess the environmental risk presented by a particular company. These registers must be searched on Agency premises and are not as yet available on the internet, a fact which surely inhibits the accessibility of this vital information. Not surprisingly, it has been suggested that the general public are not frequent users of the registers.³² If this is correct, it can perhaps be inferred that the 'slap on the wrist' is merely symbolic. Certainly, a cursory glance at recorded visits to the registers indicates that only around 1,000 checks are made per year.³³ It is, however, more usual for an enquiry to be made which requires the Agency to check the register and to communicate the results to the enquirer. Around 10,000 such checks are made annually.³⁴ This figure suggests that register entries *are* being utilised, although it is difficult to ascertain in what way and by whom.³⁵

9.3.4 Register Entries & Withholding Investment

Poor register entries and convictions for environmental offences can trigger the retraction of important sources of capital investment for industry.³⁶ Leading the incorporation of environmental considerations into capital investment decision-making are, of course, the environmental investment funds. These funds are designed to attract investors who wish to support only company groups seeking to improve the environment or their own environmental performance. While exclusion from the small number of ethical funds is unlikely to affect a company's profitability, the criteria used by 'environmental' or 'green' investment funds can be viewed as another indicator of the impact of environmental prosecutions on

³¹ Agency interviewee, May 1998.

³² A. Jordan, "Integrated Pollution Control and the Evolving Style and Structure of Environmental Regulation." (1993) *Environmental Politics*, vol. 5 pp.405-427, at p.412.

³³ Communication with Agency Operations Division (October 1998) disclosed that in the first quarter of 1998 234 direct visits had been made to Agency registers and 237 in the second quarter.

³⁴ Communication with the Operations Division revealed that in the first quarter of 1998 2,807 such visits had been made, and a further 2,729 had been made in the second quarter. (October 1998).

³⁵ The Agency is not authorised to demand information as to the purpose of register visits/enquiries.

³⁶ The Natwest Bank has a policy of examining its business customers' environmental record when making investment decisions.

business reputations.³⁷ Any failure to retract investment from companies who are prosecuted for environmental offences can be seen either as an indicator that the moral status of polluting activities is largely unchanged since Hawkins' study was conducted or, equally, as a criticism of the administration of the funds themselves.

While purporting to support only environmentally sound companies, many of these funds do not regard repeated convictions as a bar to investment.³⁸ This suggests that single convictions under environmental protection legislation have become conventionalised in the context of ethical investment (that is, these offences are being regarded as increasingly tolerable and/or morally neutral). One such fund requires a demonstration of a positive commitment to protection and conservation of the natural environment but acknowledges that; *'every company is a potential sinner in environmental terms.'*³⁹ The funds commonly use both 'compliance entries' and 'enforcement entries' from public registers in order to assist their selection of member companies. **Positive criteria** are used to assess candidate companies by the amount of effort they are putting into environmental monitoring. These funds invest only in those companies:

- *which are actively taking steps to reduce their negative impact on the environment.*⁴⁰

- expressing the *objective to invest in well researched stocks that are prime beneficiaries of enhanced environmental expenditure.*⁴¹

- *which can clearly demonstrate sound ethical and/or environmental practices.*⁴²

Negative criteria are used to exclude industries which are seen to exceed legal limits. For example, these funds;

- seek to avoid companies which have infringed environmental legislation*⁴³

³⁷ Although there has been suggestion that little enthusiasm has been shown towards these 'green' investor funds. See the evidence presented by Professor Pearce to the House of Lords Select Committee on the Environment. *Sustainable Development* 1995. 1994-95 HL 72, p.27. Any failure to retract investment from companies who are prosecuted for environmental offences can be seen either as undermining the purported impact of known offending on the reputation of the business, or equally, as a criticism of the administration of the funds themselves.

³⁸ A total of 26 funds were assessed in this research.

³⁹ TSB Environmental Investor Fund as of January 1997.

⁴⁰ Sovereign Ethical Fund.

⁴¹ Commercial Union Environmental Trust.

⁴² Skandia Ethical Managed Funds.

*avoid companies which have manufacturing operations which repeatedly breach environmental standards.*⁴⁴

*will not invest in companies which have a poor track record on pollution.*⁴⁵

Amongst the most common avoidance criteria were:⁴⁶

- 1) conviction of a pollution offence and a fine of more than £20,000 on one occasion; and**
- 2) exceeding discharge limits more than 35 times in the last year!**

It is clear from the above that these funds use high levels of enforcement/poor levels of compliance to determine which companies represent ethically unacceptable investments. *The Barchester Best of Green Fund*, for example, bases part of its avoidance strategy on environmental breaches, requiring at one time to be informed of companies which had been convicted during the period covered by Her Majesty's Inspectorate of Pollution, a predecessor of the Agency. The Inspectorate is reported as having prosecuted only a handful of operators per year.⁴⁷ It can be seen, then, that some negative criteria serve only to exclude a trifling minority of corporate offenders, lending more support to the view that a significant margin of tolerance exists with regard to incidents of environmental breach.⁴⁸ This may be attributable to the fact that even financial institutions exist in a competitive market and their will to survive dictates that they cannot insist on much higher environmental standards than their counterparts.⁴⁹ There are, therefore, inherent limitations in regarding the investments market as a mechanism of mutual enforcement.

⁴³ The Sun Life Global Portfolio.

⁴⁴ Aberdeen Ethical Fund.

⁴⁵ Credit Suisse Fellowship Trust.

⁴⁶ The Ethical Investment Research Information Service (EIRIS) details the extent to which these funds avoid investment in companies responsible for water pollution as identified by convictions for pollution or exceeding parameters within discharge consents. The EIRIS report was used alongside copies of the funds' own documentation.

⁴⁷ It also requests to be informed of companies which have violated at least one parameter in its discharge consent during the last year.

⁴⁸ Other attempts have been made to produce indicators of environmental performance. The consultancy firm Serm Rating Agency has devised a scheme which rates companies as to how well they manage the environmental risks presented by their sector. This overcomes the criticism of the non-profit organisation Business in the Environment's system which is not sector specific. See L. Boulton, "Green scores hit the bottom line" (1988) *Financial Times*, 2nd February.

⁴⁹ N. Gunningham & P. Grabosky, *Smart Regulation*. (Oxford University Press, Oxford, 1998), p.118.

9.4 Convictions, Publicity and the 'Ripple Effect'

The adverse impact of publicity was referred to by Keith Hawkins as a bargaining tool, used by enforcement officers, not as a threat to profit margins but on the basis of an assumption that a company valued its 'reputation' as a good in itself.⁵⁰ It is argued here that today, the impact of poor environmental performance extends beyond the nebulous concept of 'reputation' and can produce a ripple effect of withdrawal of opportunities in that operator's relationships with clients, regulators and the public. The following section assesses the available evidence that the adverse publicity following conviction for environmental offences has a 'ripple effect' which ultimately impacts on profitability.⁵¹

9.4.1 The Finance Sector

In chapter 3 evidence was presented that adverse publicity could ultimately affect profitability by causing a loss of patronage⁵² by the convicted operator's clients. It was concluded that at a very general level this form of 'ripple effect' substantially increased the threat of enforcement as against large scale operators. The impact of mutual enforcement can also be seen to extend to an operator's relationship with the finance sector. In particular, this sector has developed strategies for monitoring client companies to avoid inadvertent dealings with those that have made a series of court appearances. In November 1995, fourteen world-wide insurance companies signed an agreement in Geneva to boycott operators who persistently breach environmental regulation.⁵³ Public liability insurance policies still cover sudden and unforeseen incidents but now exclude protection for long term gradual pollution. Active pollution has been discouraged by insurance exclusion clauses which make it very difficult for careless and deliberate polluters to obtain cover. The courts however have been eager to retain insurance protection for polluters who are only strictly liable.⁵⁴ The Court of Appeal has ruled on the issue of whether after a polluting incident, insurance policies covered costs incurred in minimising the effects of that pollution.⁵⁵ The court refused to imply such a term of indemnity for pollution minimisation into the contract of insurance. This case illustrates a general

⁵⁰ K. Hawkins, "Bargain and Bluff." (1983) *Law & Policy Quarterly*. 35, at p.57.

⁵¹ It has been remarked that evidence of the link between environmental performance and profitability is anecdotal and attempts to make an empirical link have been fairly crude. L. Boulton, "Green scores hit the bottom line" (1988) *Financial Times*, 2nd February.

⁵² 3.3.3.

⁵³ (1995) *The Times*, 24th November.

⁵⁴ *Carlingford Australia General Insurance v EZ Industries* (1988) VR 349.

⁵⁵ *Yorkshire Water v Sun Alliance* (CA) [1997] 2 Lloyd's Rep 21.

retraction of indemnities for environmental incidents. Companies involved in environmentally sensitive trades (for example, the waste management and chemicals industries) are regularly asked to declare any environmental prosecutions, cautions or formal enforcement notices to potential and existing customers. In interviews conducted by the author, officers from the Agency indicated that they had been contacted in the region of six times per week to give details of environmental compliance records of specific companies. Such enquiries were generally made by environmental audit companies, insurance companies seeking reassurance about their policy holders' liabilities and client companies concerned about the reputations of their suppliers. All of these compliance monitoring activities can be attributed to the growing phenomenon of 'mutual enforcement.'

It seems, then, that the threat of public shaming and its 'ripple effect' for many industry managers exists, albeit at a very generalised and abstract level. Can it then really be as potent as we are led to believe? *The author's own observation of proceedings in court tends to support the view that the ripple effect is indeed taken seriously by prosecuted companies.*⁵⁶ Many of the larger defendant companies made substantial investments in improving their pollution abatement technology, apparently as a direct result of the incident, and offered their voluntary expenditure in mitigation to the court. *These expenditures were typically in the hundreds of thousands of pounds and often exceeded by far the financial penalty handed down.* While such *voluntary* expenses cannot be identified as a 'penalty,' they seem to be undertaken as a means of pre-empting public criticism and adverse publicity. The mere fact that defendants are prepared to devote substantial funds (one company spending 23 times the amount of the ultimate fine on plant improvements⁵⁷) to safeguard their plant from future pollution incidents provides some indication of the level of importance which these defendants attached to salvaging their reputation.

9.5 Enforcement & Deterrence: Which Way Now?

The conclusion arising out of chapter eight was that the existing judicial sanctions for non-compliance with environmental laws are unreliable, unascertainable and, in some cases, impotent. The additional deterrence provided by mutual enforcement appears significant, but there is little in the way of concrete evidence that it provides anything other than a vague generalised threat to profitability which is

⁵⁶ A total of 25 Agency prosecutions were observed from 1997-98 in the context of a broader piece of research into environmental enforcement. The conclusions from this research appear in a forthcoming article in the *Journal of Environmental Law*.

⁵⁷ *Environment Agency v ICI (Chemicals & Polymers)*, Widnes Magistrates' Court, July 1997.

sporadic in its impact. Once again, the logical way forward for the Agency's regulatory cause of improved environmental protection could be argued to be increasing the rate of prosecution.⁵⁸ In chapter 8, such a strategy was rejected, given the real possibility that routine prosecution could perpetuate the trivialisation of these offences. Another way forward involves a policy which the Agency is already engaged in implementing. The evolution of 'mutual enforcement' mechanisms is undoubtedly accelerated by the Agency's strategic pursuit of precedents which reinforces industry's self-policing activities. The Agency's recent pursuit of a civil case against liquidators attempting to release company creditors from the obligations arising out of a waste management licence, if ultimately successful, is an example of such reinforcement.⁵⁹ The value of such a precedent will be in securing a degree of priority for clean-up costs in a liquidation, but also in alerting the financial sector to the risks of dealing with poorly managed sites with significant environmental impact. At the time of writing, the Court of Appeal has recently handed down a judgment which favours the release of liquidators from the insolvent company's environmental licence obligations over the Agency's need to secure funds for remediation of the insolvent company's site.⁶⁰ In this judgment, Lord Justice Morritt refused to apply the 'polluter pays principle' to the case of a company unable to pay all its creditors. Yet these creditors may sometimes include shareholders of the company. Although the creditors of a company could rarely be accused of 'conniving to pollute', some of them will have invested in, or otherwise supported, an environmentally damaging enterprise, and must arguably absorb some of the risks that flow from its polluting activities. The fact that the judgment in *Re Celtic* neglects the opportunity to prioritise environmental protection is perhaps symptomatic of the fact that a consensus on the proper importance of environmental protection has not yet developed.

⁵⁸ See, for example, I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* pp259-76 at pp.260-61. See also F. Pearce, & S. Tombs, "Ideology, Hegemony and Empiricism: Compliance Theories of Regulation" (1990) 30 *British Journal of Criminology* pp.423-443 at 425 and E. Sutherland, *White Collar Crime: The Uncut Version*. (New Haven. Yale University Press, 1983) at 236-8.

⁵⁹ The Agency was arguing that a waste management licence could not be disclaimed in the course of insolvency procedures, when it had already indicated to the liquidators involved that surrender was unlikely to be contested by the Agency. See *Environment Agency v Stout* [1999] 4 All ER 746; [1999] BCC 422 discussed at P. De Prez, "Disclaimer of Onerous Property and Environmental Licences." (1998) 8(4) *Receivers & Administrators & Liquidators Quarterly*. 287. The Court of Appeal has since decided in favour of the liquidators (see R. Macrory, "Waste Management Liquidator Escapes Liability." (1999) *ENDs Rep* 295, 47) but it remains to be seen whether the same issue will be presented before the House of Lords.

⁶⁰ *Official Receiver of Celtic Extraction and Bluestone Chemicals v Environment Agency*. [1999] 4 All ER 684; [1999] 2 BCLC 555.

The Agency and its predecessors have also used litigation to extend the reach of criminal liability for environmental damage to those who are involved in the support of 'culprit' companies which have harmed the environment. For example, those who are in 'occupation' of the land by virtue only of their lending role, are subject to environmental liabilities under the waste management regime. This much is clear from the case of *Devonshire WRA v Roberts*,⁶¹ in which the *Midland Bank* had repossessed from a mortgagee a plot of land harbouring over 12,000 abandoned tyres. The bank was unaware of the tyres but, a notice was nevertheless served on them to remove the 'waste'⁶² (a task which cost an estimated £30,000). Similarly, the liability of managing 'agents' in a sibling field of environmental liability, statutory nuisance, has recently been confirmed by the High Court.⁶³ Receivers and liquidators in possession of polluted land or equipment which poses a risk to the environment may find themselves added to the list of persons vulnerable to personal criminal liability.⁶⁴

The implications of the growth in such precedents extending the reach of environmental liability are that institutions are likely to tighten up their protocols for recruiting clients or suppliers. This in turn may mean that those companies engaged in environmentally hazardous activities with poor compliance records will find financial support increasingly difficult to obtain. The Agency's strategic pursuit of precedents, therefore, accelerates the evolution of mutual enforcement and is, after all, completely consistent with the principles of 'polluter pays' and of integrating environmental considerations into all aspects of commercial and governmental decision-making. Such a policy risks, however, ignoring the fact that many of these environmentally damaging enterprises are nevertheless performing a valuable service to the environment in cleaning up the waste produced by others. An over robust regime of mutual enforcement may threaten the viability of the waste management sector as a whole. Again, therefore, sensitivity is needed in seeking to achieve an appropriate balance between robust deterrence and healthy economic development.

⁶¹ (1995) June *Environmental Law & Management*, p.105.

⁶² Section 16 Control of Pollution Act 1974, a provision which has been transferred to the current regime under s.59 EPA 1990.

⁶³ *London Borough of Camden v Gunby* [1999] 4 All ER 602 (QBD). Liability was imposed on the agent as an 'owner' of the premises from which the nuisance emanated.

⁶⁴ Further, the Agency's prosecution policy acknowledges that prosecution of company officers will be considered where it can be shown that the offence was committed with their consent, was due to their neglect or they 'turned a blind eye' to the circumstances surrounding the offence. The Environment Agency. *Enforcement and Prosecution Policy*. November 1998, at para 24.

9.6 Comment & Conclusions

Evidence has been presented in this chapter which contradicts Hawkins' monopolistic model of enforcement. The task of regulation is clearly now shared between state apparatus and industry itself. The forms of mutual enforcement discussed here are, however, not free-standing. They depend on state regulation, both as a monitor of environmental performance (in its provision of public registers of compliance and enforcement), and as a source of incentives to develop self-regulatory mechanisms. The mutual enforcement mechanisms described here, comprise a diverse range of instruments by which Agency regulation and industry self-regulation interact, and can be seen to amplify the impact of criminal law enforcement. These mechanisms are developing not only in client relationships within industrial sectors, but also in the financial sector's treatment of industry and in market behaviour. Whilst the existence of mutual enforcement is undisputed, the extent of its impact is exceedingly difficult to gauge. From a deterrence point of view, this fact is important, for, as with many regulatory strategies, these mechanisms obscure 'transparency' of enforcement for regulated organisations, meaning they are unable to calculate the costs of poor compliance records. Strategic publicity can therefore be used by the Agency to exaggerate the true impact of poor compliance records on profitability.

The answer to any frailty in sanctions for non-compliance, does not appear to lie in any great increase in the *certainty of enforcement*, for, if a series of convictions under environmental protection legislation was to be seen as something which most companies had, this would tend to undermine the ideological function of criminalisation. A series of previous convictions would merely be anticipated as an inevitability of trading. Evidence has been presented in chapter 8 which suggests that this view is already held where a company has a single conviction.

Far more effective is the Agency's acceleration of mutual enforcement by the strategic pursuit of precedents which reinforce industry's self-policing activities. The Agency's instrumental use of the courts provides strong evidence that enforcement style is not wholly predetermined by external social forces, and portrays the Agency as having the capacity to direct and shape some of the social forces which, in turn, direct and shape enforcement. This depiction of the Agency in the independent pursuit of changes in the currents of opinion towards environmental offending, and in the manipulation of industry from regulated to

regulator, contrasts with the extremely deterministic portrayal of regulators in *Environment and Enforcement*. Although far from author of its own destiny, this regulator is clearly engaged in strategically facilitating the 'progressive stigmatisation' of environmental offending which was predicted by Paulus.⁶⁵

It is hoped that the Agency continues to build on its practice of strategic litigation. The ultimate outcome of sensitive, strategic manipulation of mutual enforcement mechanisms by the Agency is likely to be a process of 'corporate capture,' by which corporate values of profit maximisation gradually come to be redefined in terms of the Agency's own regulatory objectives of environmental protection and compliance.

⁶⁵ See 1.1.2.



Chapter 10

CONCLUSIONS

"Yet in modern societies nearly every aspect of legal life is in a state of flux....Continuous shifts are taking place in the kinds and rates of cases that enter the legal process...in legal personnel and in the relationship between legal control and other aspects of social life, such as status hierarchies, informal control mechanisms, the cultural sphere [and] political movements."

D. J. Black, "The Mobilization of Law." (1983) 2 *Journal of Legal Studies*. 125.



*C*HAPTER 10

Full Circle

This research has come full circle and can now offer some tentative answers to questions posed by Hawkins himself;

"My intention has been to portray the formal process of prosecutions as...a shadowy entity lurking off-stage, often invoked, however discreetly, yet rarely revealed. Why is it so little used and by what principles are particular cases selected for prosecution?"¹

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- 10.3 Reasons for Continued Loyalty to the Compliance Tradition
- 10.4 Enforcement Priorities: Environmental Protection or the Pursuit of Credibility?

¹ K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.191.

10.1 The Agency as a Compliance-Oriented Enforcer

The first substantive conclusion in this project, nearly 20 years on, mirrors that of Hawkins - that the law is still used as 'a last resort.' Given that Hawkins attributed informal styles of enforcement largely to the lack of moral consensus surrounding environmental offending, it might have been expected that the environment's 'movement up the political agenda'² would have produced a more formal enforcement style. Before exploring the drivers of enforcement style in the Agency, it was necessary to first broadly identify the enforcement style adopted by this regulatory body. Interesting conclusions emerged from this preliminary stage of the research, both as to regulation before and during the existence of the Agency. These conclusions contradicted commonly held beliefs about pre-Agency regulation yet confirmed existing ideas about the style of regulation generally in Britain. For example, whilst the enforcement reputations of the pre-Agency bodies would have placed the NRA (the water pollution regulator) as the closest to a sanctioning approach to enforcement, and HMIP (the prescribed processes regulator) as nearest to the compliance-based approach, a closer look at the available evidence suggested a slightly different picture. The commonly perceived order could be re-arranged with waste regulation occupying the closest position to the sanction-based approach rather than water pollution regulation.³

On the continuum of enforcement styles, the Agency as a whole appeared to occupy a position at the compliance-based end, just as Hawkins had reported of the Regional Water Authorities. In tandem with Hawkins' conclusions, prosecutions were taken against less than one percent of reported incidents,⁴ prosecution was generally only pursued when 'fault' was identified on the part of the operator⁵ and reliance was placed primarily on education and persuasion as a means of obtaining compliance.⁶ The cross-sectoral survey confirmed that enforcement behaviour across all three sectors of the Agency shared these characteristics, even the water pollution sector, which had attracted a reputation prior to the Agency of '*robotic legalistic enforcement*.'⁷

² See 1.3.

³ At 3.3.

⁴ See fig 2.3 for approximated statistic in the water pollution sector and 2.1.1 for the prescribed processes sector. A similar figure was mentioned in K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984) p.177.

⁵ At 2.3.1-2.3.3 and *ibid.* at pp.161-166.

⁶ At 2.6 and 3.3, and *ibid.* at pp.122-128.

⁷ At 2.1.2.

The conclusions that the respondents from the Agency endorsed minimal prosecution and conducted the majority of their enforcement functions without recourse to formal mechanisms,⁸ that prosecution rates were somewhere around 1% of total 'incidents'⁹ and that site inspections in the process industries sector were still announced in advance¹⁰ - could be interpreted as a suggestion that enforcement is unchanged in this field of regulation from Hawkins' research. This would not, however, be an accurate representation of the conclusions of this research. A useful comparison can be made, for example, by looking back almost 30 years to Bugler's recommendations for the then Alkali Inspectorate as to how it should re-style itself:

*"The inspectorate must abandon its concept of itself as a partner and conceive itself as an industrial air pollution police force, its role being to protect the public, to see that laws are enforceable and miscreants duly punished....[It] must become more answerable to the public. As a beginning, the workings of the Inspectorate should be open to the public gaze. District inspectors should have district offices with names and addresses in the telephone books...information [on industry's compliance] should be open to any member of the public who requests it....The name of the inspectorate should be changed...to something less opaque to the man in the street."*¹¹

This research does indeed confirm that, despite the fact that the 'environment' has apparently 'moved up the political agenda,' the compliance style of enforcement remains the hallmark of mainstream environmental enforcement in Britain. Yet clearly, regulation by the Environment Agency is far removed from the regulator which Bugler described. There are now increased similarities between aspects of the Agency's enforcement work and the concept of a police force;¹² Agency regional offices are accessible to the public 24 hours a day, compliance data is available on public registers¹³ and the Agency's title could hardly be more transparent. An

⁸ At 3.3.

⁹ See fig 2.3 for approximated statistic in the water pollution sector and 2.1.1 for the prescribed processes sector.

¹⁰ At 3.2.2.

¹¹ J. Bugler, *Polluting Britain*. (Penguin, London, 1972) at p.31.

¹² See particularly the conclusions in respect of waste management officers regarding their views of operators and their limited acceptance of the need to punish offenders. The Agency have even employed the service of 'canine crime busters' for the purposes of sniffing out evidence, people searching and protection of officers. See "Trio's Nose for Crime." (1990) *Environment Action*, August/September p.3.

¹³ The provisions are as follows; s.20 EPA 1990 for IPC, s.64 EPA for waste management and for water quality, s.190 WRA 1991, for waste management. See particularly section 20(1)(g) EPA which requires information obtained or furnished in pursuance of authorisation conditions to be on the register. Most IPC authorisations require that all breaches of its condition be reported to the Agency.

understanding of why this regulator has remained loyal to the tradition of compliance-based enforcement requires an understanding of the social forces that shape regulatory enforcement.

10.2 Drivers & Inhibitors of Enforcement in the Agency's Environment

Regulatory survival dictates that the regulator must operate within the expectations held by the regulator's various 'masters.' These 'masters' include not only the operators themselves, but also the public at large, the courts and the policies handed down from Whitehall. The portrayal of enforcement which is being suggested here is a variation on that of 'regulatory capture,'¹⁴ but one in which the regulator can be captured by many conflicting interests simultaneously. The Agency adopts, in part, the value systems of the public, of the operators and of the courts in order to portray itself as a credible authority with real regulatory 'clout' and thereby ensure its own survival. In other words, the Agency's performance of its enforcement functions is informed by a myriad of values other than the one which appears to be dictated by its statutory mandate¹⁵ - the seriousness of the threat to the environment. Although these influences have been discussed under separate headings and in separate chapters, this has been in the pursuit of convenience and clarity. The influences on enforcement which have been examined and evaluated are, of course, highly interdependent, and this last chapter strives to highlight this fact.

Most of the drivers affecting enforcement examined here were discussed in the context of inhibiting enforcement style. These 'inhibitors' imposed constraints on the style of enforcement which could be adopted by the Agency if it was to maintain its credibility as an enforcer. This portrayal has clear parallels with Hawkins' deterministic portrayal of the Water Authorities. The existence of these inhibitors helps to explain why the Agency continues to appear to have a strong aversion to legalistic enforcement, and continues the tradition of compliance-based enforcement despite the supposed progressive stigmatisation of environmental damage.

¹⁴ i.e. the idea that regulators' own priorities and objectives become assimilated to the interests of those they are meant to police.

¹⁵ Section 5 of the Environment Act 1995 imposes a duty to '*prevent or minimise or remedy or mitigate the effects of pollution of the environment.*'

10.2.1 Enforcement and Perceptions of The Regulatory Population

Starting with the source of influence traditionally associated with regulatory capture, this work assessed the impact of regulatory population on enforcement style. This examination suggests that the differences in enforcement style identified between the sectors of water, waste and process industries were largely a function of perceived differences in the regulatory populations, rather than differences in the beliefs and values of the regulatory officials concerning enforcement. Hawkins' conclusion that different enforcers behaved remarkably similarly was, therefore, unexpectedly confirmed.¹⁶ For example, the waste and prescribed processes sectors differed in their enforcement profiles, but also viewed their operators very differently. Waste management personnel, tended to anticipate physical and even violent resistance as common amongst the regulatory population, with profit-seeking perceived as the prominent motive for offending.¹⁷ In contrast, when process industries personnel encountered resistance it was in the form of legal challenge and they identified the prominent reason for offending as incompetence,¹⁸ regarding deliberate offending as almost non-existent in their sector.¹⁹ There has been some suggestion in this thesis, however, that the Agency's confidence in this sector is sometimes misplaced.²⁰ All three sectors, however, held strikingly common beliefs concerning enforcement. For example, officers converged in their belief;

- that 'prevention of damage' was the Agency's primary function,²¹
- that the most important consequence of prosecution was generally the adverse publicity for the defendant,²²
- that education and persuasion were of primary importance in obtaining compliance with the law,²³
- that prosecution was rarely necessary given the willingness of the vast majority of regulates to comply with legal requirements;²⁴ and

¹⁶ The common assumption has been that, on the contrary, the very different histories attributable to the three sectors of pollution control produced sharp distinctions in enforcement style. See D. Hughes, "Of Regulation and Regulators." (1993) 5(6) *Environmental Law & Management*. 175 and the preliminary conclusions of chapter 2.

¹⁷ 3.2.1 (ii).

¹⁸ 3.2.2.

¹⁹ At 3.2.2 (ii).

²⁰ See the examples cited of the Radioactive Substances inspectors at 3.5.

²¹ Appendix B, fig. 13.4.

²² Appendix B, fig. 13.6.

²³ Appendix B, fig. 13.9.

²⁴ At 3.5.1. 72% of respondents felt that the majority of operators rectified their breach as soon as they were made aware of it.

- the negative view that prosecution represented a failure on their part to prevent non-compliance.²⁵

While Hawkins' model remains convincing in pointing to the primary importance of enforcers' perceptions of their regulatory population, the profile of the regulatory organisation should not be ignored completely as a determinant of enforcement style. This study has shown that the legal framework within which the regulator operates can be influential, for example, the greater range of enforcement mechanisms at an enforcer's disposal, the less frequently the ultimate sanction of prosecution will be utilised.²⁶

The fact that this research generally supports the view that the perceptions of the regulatory population are a major determinant of enforcement style was unsurprising. What was surprising and new, was the uncomfortable conclusion Hawkins' model led to when applied across the two very different regulatory populations of waste regulation and prescribed processes, both of which are now regulated by the Agency. The paradoxical outcome was that for larger plants dealing with substances of greater hazard, prosecution was less likely to follow a breach.²⁷ In itself, the paradox that the plants which presented the greatest hazards to the environment tended to be regulated by way of a conciliatory approach, yet the farmer or unlicensed angler was often prosecuted on his first offence is difficult to reconcile.²⁸ This research gave rise to a number of justifications for the dominance of the informal, compliance-based approach to enforcement in the process industries sector, including:

- this sector's vulnerability to adverse publicity;²⁹
- the difficulty that large scale operators had in avoiding implications of 'fault' when an incident occurs on their site (which has the effect of further amplifying the threat of court action);³⁰ and
- the prescribed processes enforcement personnel subscribing to the view that **90%** of operators rectified their breach as soon as it was brought to their attention.

²⁵ Ibid. **35%** of officers saw high prosecution rate as a sign of enforcement failure.

²⁶ 3.3.3(iii).

²⁷ At 3.4.

²⁸ At 3.3.3 (iii).

²⁹ Chapter 3.

³⁰ At 3.3.3.

Despite the persuasiveness of these justifications, as long as this paradox continues, public confidence in the Agency will always be under threat. Here again, Hawkins' model can be modified. The preference for a particular style of enforcement has implications for the degree to which the regulator must use prosecution as a symbolic show of strength. Continued reliance on the 'law as last resort' strategy is likely to increase public anxiety about a regulator's capture by industrial interests and, therefore, augments the need for responsiveness to public expectation in enforcement decision-making.

10.2.2 The Impact of Public Feeling

Enforcement style in the Agency was certainly influenced by the need to respond to incidents that public instinct deemed to be serious by virtue of their visual impact. The necessity of responding to public demand was intensified, if not created by, the practice of compliance styles of enforcement. Such informal regulation is readily construed by the public as a malaise on the part of the regulator, and needs to be offset by a public demonstration of regulatory 'clout.' From inside the Agency, regulatory willingness to indulge the public's ignorance as to which incidents/operators present the greatest risk to the environment was sometimes construed as an undesirable diversion of Agency resources from the job in hand. Such diversions were regarded by some as too costly in terms of lost opportunities to conduct inspections and uncover regulatory violations more worthy of attention. The 'harm' that the Agency is charged with minimising and preventing³¹ is one which is primarily assessed according to the scientific paradigms of microbiology, biochemistry and hydrology, and, indeed, these are the disciplines which officers generally bring to the Agency as new recruits. This should not, however, disguise the fact that regulatory enforcement is a political rather than a scientific process.

This study confirms the continued relevance of Hawkins' political ambivalence in enforcement decision making. Hawkins commented on the fact that response to public feeling was not regarded as a legitimate end of regulatory behaviour,³² but by measuring such behaviour against the formal aims of the Agency, it was possible in this study to articulate some persuasive justifications. Where the decision to prosecute was influenced by public concern, Hawkins explained the decision by referring to the need to construct symbolic shows of activity to placate the public. In fact, not only do such decisions perform the function of pre-empting public criticism, they facilitate public confidence and thereby help to preserve the public as

³¹ Under s.5(1) of the Environment Act 1995.

³² K. Hawkins, *Environment and Enforcement*. (Clarendon Press, Oxford, 1984), p.195.

a source of information on non-compliance. They can also placate public concern over the Agency's continued use of compliance/informal enforcement. Moreover, such prosecutions can result in court cases where substantial fines are more likely to be imposed and thereby facilitate general deterrence. Operators' awareness of the link between public concern and enforcement behaviour results in a more co-operative response from operators themselves.

Decisions to prosecute which are influenced by public concern do not, therefore, necessarily represent a betrayal of the Agency's commitment to environmental protection. There was no indication in this research that public feeling 'trumped' environmental protection considerations. Public feeling was rather a consideration which Agency decisions may advert to as a means of maintaining and enhancing its credibility as a regulator. The better an environmental regulator's ability to win public confidence, the better its ability to serve its primary aim of protecting the environment.

10.2.3 The Impact of Moral Ambivalence

Once again, Hawkins' conclusions that the ambivalence surrounding the enforcers' task of regulating and sanctioning behaviour which was not regarded conclusively as 'wrong' are still of relevance today. Again, this conclusion was not to be expected given the increased emphasis in modern society of environmental issues.³³ Environmental offences are nevertheless still subject to a significant degree of moral ambivalence.³⁴ While Hawkins' model of the social and political constraints on enforcement is largely unchanged by this section of the study, the role of the participants in litigation (the prosecutors, the defence and the courts themselves) is hopefully clarified. The perpetuation of the moral ambivalence surrounding environmental offences has been shown to be 'alive and well' by the strategies of mitigation employed by defendants in environmental prosecutions. The routine practices of defence counsel in trivialising the importance of the defendant's acts, and in questioning the propriety of prosecuting, are surely in part responsible for the continued frailty of penalties applied by the courts in these cases.³⁵ The fact that the Agency's largest fine in 1997 represented a £15 fine against someone with a salary of £30,000 provides strong circumstantial evidence that trivialisation is having a real impact on the courts' sentencing discretion. If the Agency is to maintain credibility as a regulator, it must be cautious about prosecuting those cases

³³ See 1.3.

³⁴ Chapter 5.

³⁵ As discussed in chapter 8.

which do not fit the template of criminal conduct, for example, because there is no evidence of culpable *mens rea* or, because the 'damage' cannot be proven or is capable of being trivialised. Once again, the Agency's view of which cases are suitable for prosecution is, in a sense, compromised by the need to create a prosecution profile which coincides broadly with the level of opprobrium that society attaches to these offences.

Despite Hawkins' portrayal of the regulator as unable to influence its own fate, it has been argued here that the Agency can use criminal prosecution strategically to increase the moral opprobrium attached to these offences. The conclusions of this study also depart significantly from Hawkins' model in highlighting the role of the courts as crucial rather than diminutive in the shaping of enforcement behaviour. It is the courts who will ultimately determine whether the trivialisation of environmental offences is to continue or will shift to greater levels of opprobrium and sanction.

10.2.4 The Impact of Enforcement Mandates

Hawkins' model was derived from a sociological study based on interaction with the enforcers themselves. By its very nature, therefore, it tended to minimise the importance of legal rules and mandates and emphasise the importance of the autonomy of the individuals concerned. Yet, the substance of legal rules are all important in determining the jurisdiction of the regulator and hence its bargaining power. The mandates discussed in chapters 6 and 7 as a whole, promote increased transparency³⁶, and appear to be an attempt to increase the credibility of regulatory enforcement by reflecting 'due process' considerations. Yet, environmental regulation in the UK has traditionally been founded on regulatory bargaining which obscures transparency as a means of offsetting the limited effectiveness of the prosecution as a means of deterrence.³⁷ That process of bargaining still plays a central role in Agency regulation.³⁸ The publication of these standards, and their potential to create increased possibilities for review, enhances the operator's negotiating power within this bargaining context. For, in the face of threats to prosecute for minor infractions, or to require substantial expenditure to abate small risks, operators can call the trumps of '*proportionality*' and '*transparency*' and the

³⁶ The principle of transparency is discussed at 6.3.3.

³⁷ See further at 6.3.3.

³⁸ This much was clear from chapter 3 and Mehta's work, A. Mehta, & K. Hawkins, "IPC & Its Impact: Perspectives from Industry." (1998) 10(1) *Journal of Environmental Law* 10(1) 61. A. Mehta, "IPC Penalties and Deterrents: The View from Industry." (1997) 9(6) *Environmental Law & Management*. 274.

duty to have regard to costs and benefits to their aid. The impact of enforcement guidance as a driver of enforcement style at a general level has been to impose reviewable standards which augur a significant shift from unbounded discretion towards enforcement 'rules', and a movement away from Hawkins' enforcement tradition of 'bargain and bluff.'

10.2.5 The Impact of Judicial Sanction & Beyond

Hawkins' model of enforcement portrayed the courts diminutively in their capacity to influence enforcement style. This study has treated judicial behaviour as a crucial component in the enforcement equation. Each case may result in the prosecutor, and often the officers of that region, adjusting the way in which they present or collect evidence and, ultimately, which cases they will take before the courts in the future. The response of the magistrates is often unpredictable, because of the diversity of their understanding of environmental matters. Yet in one respect, the lower courts are broadly consistent - the sanctions attracted by environmental offences remain relatively small. Once again, the Agency must look beyond environmental protection as the sole criterion for selecting cases for prosecution. It must engage in a selection process which refrains from taking cases to court which will expose the likelihood of minimal sanctions, or which will tend to undermine their reputation as stealthy enforcers.

The courts have been portrayed here as occupying both a reactive and proactive role in the progressive stigmatisation of environmental offences. As there remains a lack of moral consensus on the opprobrium to be directed at environmental offences, the reaction of the magistrates' bench to techniques of trivialisation is often to further trivialise environmental offending. Ultimately, judicial sanction can also impact on society's views of environmental offending, thereby provoking change in the currents of social opinion. However, environmental enforcement is no longer monopolised by state regulation. Mechanisms of mutual enforcement, possibly designed to pre-empt regulation, are helping to offset the inadequacies of the judicial sanctioning system.

10.3 Reasons for Continued Loyalty to the Compliance Tradition

*"It is important,...particularly in the area of criminal law which governs conduct, that society's notion of what is the law and what is right should coincide. One role of the legislator is to detect any disparity between these notions and to take appropriate action to close the gap."*³⁹

In environmental protection, legislators have perhaps deliberately left this gap between what the law prohibits and what society regards as 'right' wide open. This chasm forms the discretion which the regulator must patrol with caution. In order to ensure its own survival it must not enforce its powers to their limits, but must operate within the boundaries of what it believes external constituencies will find acceptable, and in a manner that will increase its own legitimacy as a credible enforcer.

The drivers of *moral ambivalence* (in restricting the types of cases which the courts will accept as deserving of punishment), the *frailty of judicial sanction* (in exposing the weaknesses of the Agency's ultimate sanction), the enhanced threat of *reviewability* (in directing the Agency marginally further away from formalistic enforcement which might open the door to review) and *enforcement guidance* (in forcing a move away from the enforcement tradition of bluffing) have been argued here to augment or increase the likelihood that the Agency will continue to avoid legal sanction as a means of securing compliance. Only the Agency's need to respond to the *public demand* for visible enforcement as a response to visible impact on the environment has been discussed as a factor which tends to promote increased rates of prosecution. These forces keep environmental regulators relatively fixed at the compliance-oriented end of enforcement and help to explain why, despite the progressive stigmatisation of activities which harm or threaten the environment,⁴⁰ new factors have replaced lack of political support in defining a compliance-oriented style of enforcement as necessary for the regulator's survival.

One implication of continued reliance on the compliance tradition is an apparent lack of public confidence in the regulator.⁴¹ The 'solution' often advanced for

³⁹ S. Shute, "The Place of Public Opinion in Sentencing Law." (1998) *Criminal Law Review*. 465.

⁴⁰ As predicted by Paulus (see earlier at 5.1). I. Paulus, *The Search for Pure Food*. (Martin Robertson, Law In Society Series, London, 1974).

⁴¹ "We have watched with profound disappointment the dwindling of public confidence in the Agency's suitability for this [enforcement] role." House of Commons Select Committee on Environment, Transport and Regional Affairs, 6th Report, 'Sustainable Waste Management,' 1997-98 HC 484 at 235.

'weak' enforcement, and, in particular, low penalties, is to increase the rate of prosecution.⁴² This would ostensibly encourage greater public confidence in the regulator as a 'tough' enforcer, would increase the courts' familiarity with the environmental prosecution, would build consensus on pollution as 'wrongdoing' in society generally and would enhance the threat of enforcement to operators undeterred by presently trivial sanctions for non-compliance. The political process of enforcement cannot however be reduced to such mathematical formulae. Low penalty rates cannot *necessarily* be offset by increasing enforcement rates. In fact, there are foreseeable pitfalls in adopting a strategy which greatly increases the certainty of enforcement. Increasing exposure of regulatees to the courts by increasing the frequency of prosecution could potentially facilitate the further trivialisation of these offences.⁴³ The fact that only the select few appear in court gives rise to the inference that a prosecution signifies a very serious infringement. If the Agency's policy on certainty of legalistic enforcement were adjusted so that, say, 5% or 10% of incidents were prosecuted, any existing tendency to regard conviction not as a condemnation but an incident of economic activity would surely be compounded. The tolerance which has developed towards a small number of convictions between large operators bears testimony to this argument.⁴⁴ This compounding effect of increased prosecution rates on trivialisation may also affect judicial sanctioning behaviour. The common occurrence of prosecution may encourage their belief that offending is not culpable but unavoidable, and as more operators are prosecuted in their own right, the need to include exemplary elements in sentencing to deter others from non-compliance will also be reduced. Further, increased familiarity with the courts would provide operators with more information from which to reliably calculate the sanction associated with non-compliance, a concern of particular import given that it seems under present circumstances, where little information is available, operators are risk averse in their calculation of the impact of non-compliance.⁴⁵ More reliable predictions of the disbenefits of non-compliance would perhaps, therefore, encourage greater levels of violation.

⁴² The argument asserts that the ineffectiveness of a threat of unlikely prosecution can be offset by raising the likely penalty if prosecution does occur, and *vice versa*. See, for example, I. Ehrlich, "The Deterrence Effect of Criminal Law Enforcement." (1972) 1 *Journal of Legal Studies* 259 at pp.260-61 and C.G. Veljanovski, "The Economics of Regulatory Enforcement." in K. Hawkins, et al *Enforcing Regulation*. (Kluwer Nijhoff Publishing, Boston, 1984) pp.169-91 at p.175. See also F. Pearce, & S. Tombs, "Ideology, Hegemony and Empiricism: Compliance Theories of Regulation," (1990) 30 *British Journal of Criminology*. 423 at 425 and E. Sutherland, "Is White Collar Crime, Crime?" (1945) *American Sociological Review*. pp.132, at 236-8 and the brief discussion in R. Baldwin & M. Cave, *Understanding Regulation*. (Oxford University Press, London 1999) pp.110-112.

⁴³ At 8.5.

⁴⁴ At 8.5.

⁴⁵ At 6.3.3.

10.4 Enforcement Priorities: Environmental Protection or the Pursuit of Credibility?

It was assumed at the outset of this research that the ultimate aim, and, therefore, the enforcement priorities of the Agency, would be the protection of the environment. Cases for prosecution would therefore be prioritised according to the risk which the incident or breach posed to the environment and, possibly, the extent to which the individual operator was likely to respond positively to being sanctioned by the courts. It has been seen from some of the conclusions of this project that the 'environment' of enforcement requires that the Agency must sometimes appear to deviate from this priority. For example, the Agency will sometimes be influenced by what the public believes should result in prosecution. On other occasions, the likelihood that the court will react unfavourably to a prosecution may take priority, and in others, the constraints of externally imposed principles of *proportionality*, *consistency* and *transparency* are likely to deter the Agency from prosecuting. These considerations have very little to do with the seriousness of the harm that a particular incident or operator poses to the environment. Nevertheless, above its statutorily designated purpose, a regulator must ensure its own survival. Only if the regulator strives towards being perceived as an ultimately powerful enforcer to its regulatees, and as a responsive enforcer protecting the public interest from the excesses of industry, can it achieve its statutory purpose of protecting the particular dimension of public interest which has been entrusted to it. Thus, in order to maintain credibility, the Agency will not necessarily prosecute only those incidents/operators which present the greatest environmental risk.

At a general level, this work therefore offers a response to those critical of the tradition of informal, conciliative enforcement and who view it as a symptom of the regulator being captured by regulated interests.⁴⁶ This thesis has demonstrated that the statutory 'public interest' aims which are bestowed on regulators must necessarily be subordinated to the aims of self-preservation and maintaining credibility. Striving for credibility results in a number of external forces 'capturing' the regulator. Within the space afforded by these external forces which have

⁴⁶On the subject of regulatory capture see C. Wells, *Corporations and Criminal Responsibility*. (Clarendon Press, Oxford, 1993) at p.29. See also on this point, L. Snider, "Co-operative Models & Corporate Crime: Panacea or Cop-Out?" (1990) 36(3) *Crime & Delinquency*. 373, A. Ogus, et al. *Policing Pollution: A Study of Regulation and Enforcement*. (Oxford University Press, Oxford, 1982), P. H Schuck, "The Curious Case of the Indicted Meat Inspectors." *Harpers Magazine*. (1972) September and I. Ayres, & J. Braithwaite *Responsive Regulation*. (Oxford University Press, Oxford, 1992).

'captured' the Agency, informal compliance-based enforcement continues to be the most efficient means the Agency has of raising compliance.

Although the various influences on enforcement style are all interdependent, there is one which lies at the root of any real change in enforcement practice, and that is society's perceptions of and attitudes towards environmental protection. When the public's view of environmental damage as wrongful or unacceptable increases significantly in force, each of the other drivers eventually responds; public opinion forces at least an appearance of regulators taking a more cynical view of operators, courts respond to public opinion by raising sentencing levels and Government responds by issuing directives which urge changes in enforcement. A precursor to any fundamental change in environmental enforcement practice is not a change in 'who does the enforcement' but a shift in public feeling:

*"Too many people concerned in environmental protection in Britain forget that they exist to serve the man on top of the Clapham bus (sic). What the offensive against pollution needs in Britain is not only new laws, not only new agencies...but new attitudes."*⁴⁷

⁴⁷ J. Bugler, *Polluting Britain*. (Penguin, London, 1972) at p.176.



APPENDIX A

ENFORCEMENT STATISTICS



FIG 11.1 RATE OF WATER QUALITY PROSECUTIONS :¹

Year	Number of Prosecutions	Number of WQ Incidents ²	Percentage of Incidents Prosecuted
1998-99	270	18,763	1.2%
1997-98	261	---	
1996-97	235 ³	32,409(20,158)	1.1%
1995-96	271	35,891(23,463)	1.15%
1994-95	316	35,291	0.9%
1993-94	423	34,296	1.2%
1992-93	435	32,254(approx)	1.4%
1991-92	536	29,524(approx)	1.8%
1990-91	490	29,000(approx)	1.7%
1989-90	292	28,000(approx)	1.0%

This table shows prosecution rate to range from 0.9% to 1.8% of reported, i.e. not substantiated, incidents, although for the years 1995-97 the figures in brackets represent the substantiated incidents only, and it is these which the prosecution rate is worked out against for these two years.

¹ Reporting practices changed in 1995 from financial years (April - April) to calendar years.

² i.e. reported incidents rather than substantiated incidents.

³ Again, this figure relates only to successful prosecutions, as detailed in the Environment Agency Annual Report 1997.

FIG 11.2

Summary of incidents involving North West Water's assets reported by the Environment Agency and resulting action⁴					
Category	1993	1994	1995	1996	1997
Major	25	13	7	4	5
Significant	324	262	131	59	42
Minor	535	586	921	534	291
Total	884	861	1059	597	338
Action Taken					
Cautions	6	5	7	5	0
Prosecutions	10	6	2	0	4

⁴ North West Water (1998) Environment Report 1997-98: Improving the Quality of Life, at p.15.

FIG 11.3 RATE OF WASTE MANAGEMENT PROSECUTIONS :

Year	Number of Prosecutions
1998-99	367
1997-98	290
1996-97	241(254)⁵
1995-96	282⁶
1994-95	400
1993-94	442
1992-93	360
1991-92	262

⁵ This figure relates only to successful prosecutions as stated in the Environment Agency Annual Report 1997. The figure in parentheses is the estimated total prosecutions for this year according to a national survey conducted during the research.

⁶ This figure is an estimate based on a national survey conducted during the course of the research, and is an attempt to fill a gap in official statistics.

FIG 11.4: AVERAGE FINES IMPOSED: NRA NORTHWEST

Year	Average Fine
1995-96	£3593
1994-95	£3054
1993-94	£3050
1992-93	£2206
1991-92	£1999
1990-91	£719
1989-90⁷	£961

FIG 11.5: PROSECUTION RATE: NRA NORTHWEST

Year	Number of Prosecutions
1995-96	60
1994-95	78
1993-94	84
1992-93	76
1991-92	82
1990-91	84
1989-90	36

⁷ For the purposes of this average, the £1million fine against *Shell (UK)* was subtracted as distorting the figures (see 2.1.2).

FIG 11.6: RATE OF PROSECUTIONS BROUGHT UNDER INTEGRATED POLLUTION CONTROL BY HER MAJESTY'S INSPECTORATE OF POLLUTION & THE AGENCY:⁸

Year	Number of Successful Prosecutions	Formal Notices Issued	Number of Complaints
1998-99	16	86	
1997-98	11	62	
1996-97	12⁹	40¹⁰	
1995	15	80	
1993-94	12	56	1648(157)
1992-93	14	36	1764(389¹¹)
1991-92	12	37	1731(372)
1990-91	1	3	(335)
1989-90	0	5	(365)

⁸ Statistics taken from the relevant Environment Agency Annual/ Her Majesty's Inspectorate of Pollution Reports and Accounts.

⁹ Of these prosecutions, eight were under the IPC regime and a further four were under the Radioactive Substances legislation.

¹⁰ Of these notices, 34 were issued under the IPC regime and six were issued under Radioactive Substances legislation.

¹¹ the figure in brackets signifies the number of processes complained against. Figures of total complaints were not made available for every year.

FIG 11.7 RATE OF WASTE MANAGEMENT AND WATER QUALITY PROSECUTIONS BROUGHT PRIOR TO THE COMMENCEMENT OF THE ENVIRONMENT AGENCY

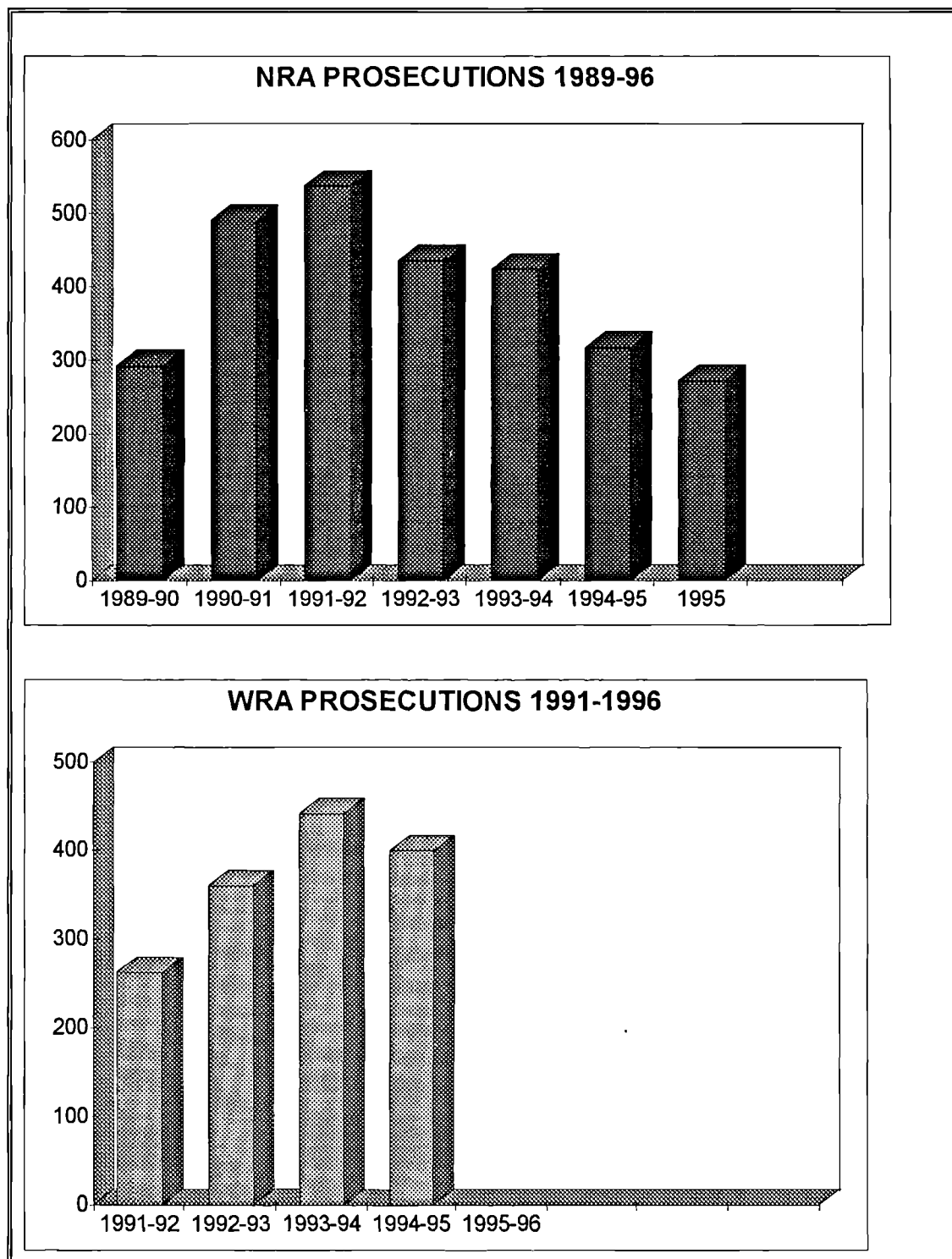


FIG 11.8 THE POPULARITY OF THE ENVIRONMENT 1976-1991
(Figures collated from the Parliamentary Papers Index):

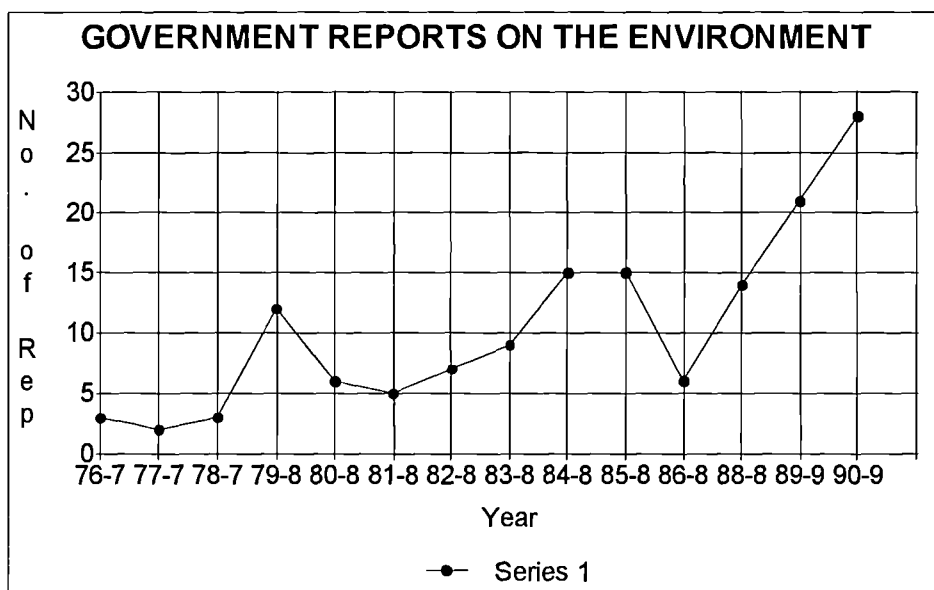


FIG 11.9
AVERAGE FINES IMPOSED: NRA NORTHWEST

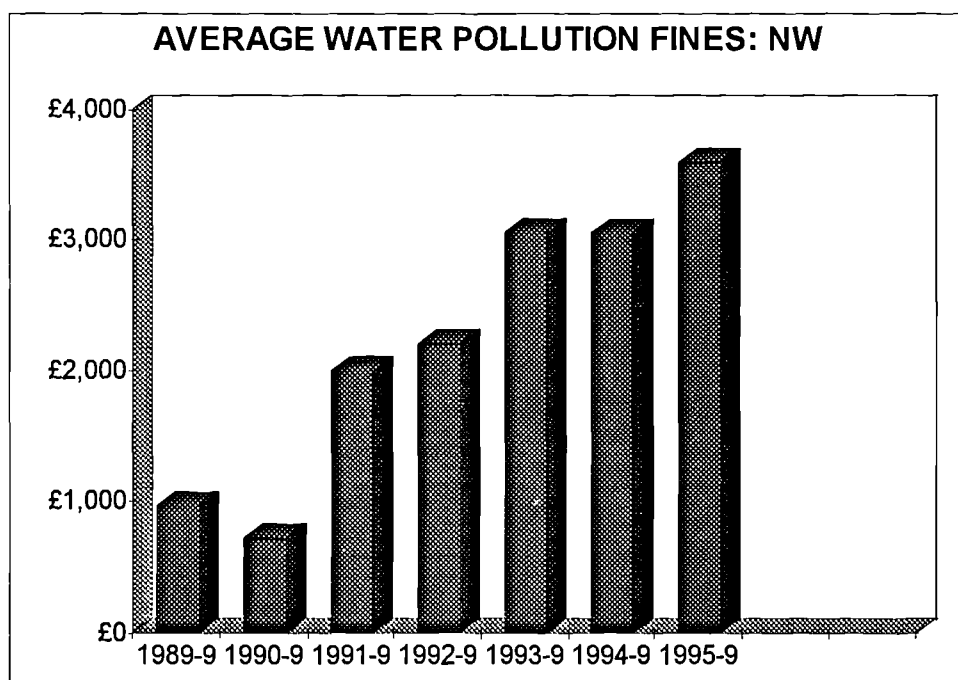


FIG 11.10:RATE OF PROSECUTIONS BROUGHT BY HER MAJESTY'S INSPECTORATE OF POLLUTION

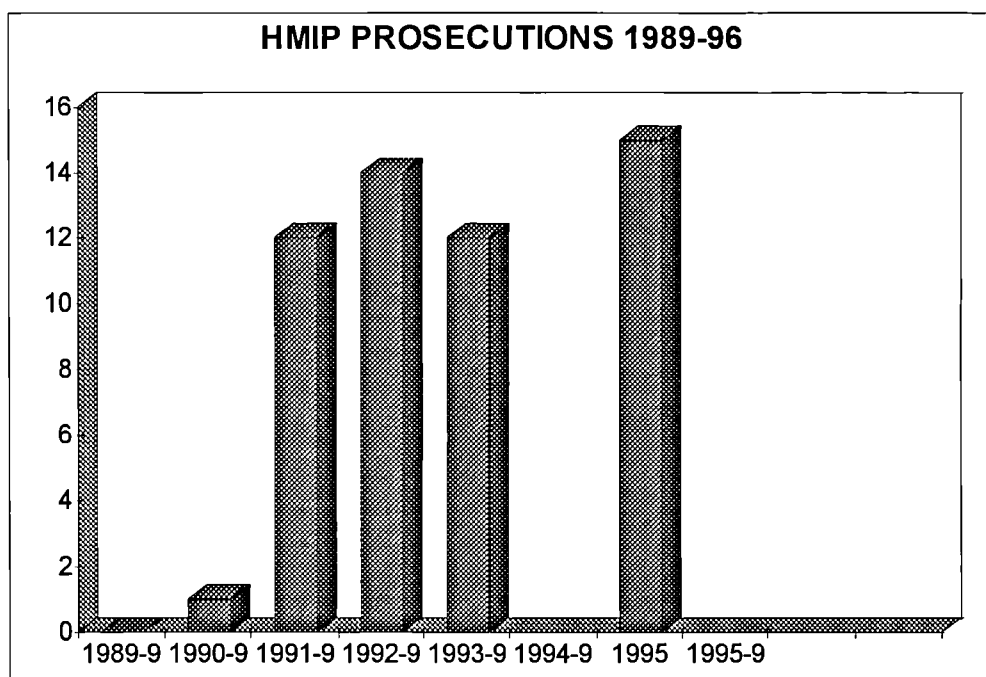


FIG 11.11
DISTRIBUTION OF PROSECUTIONS BETWEEN WASTE MANAGEMENT, WATER QUALITY AND INTEGRATED POLLUTION CONTROL

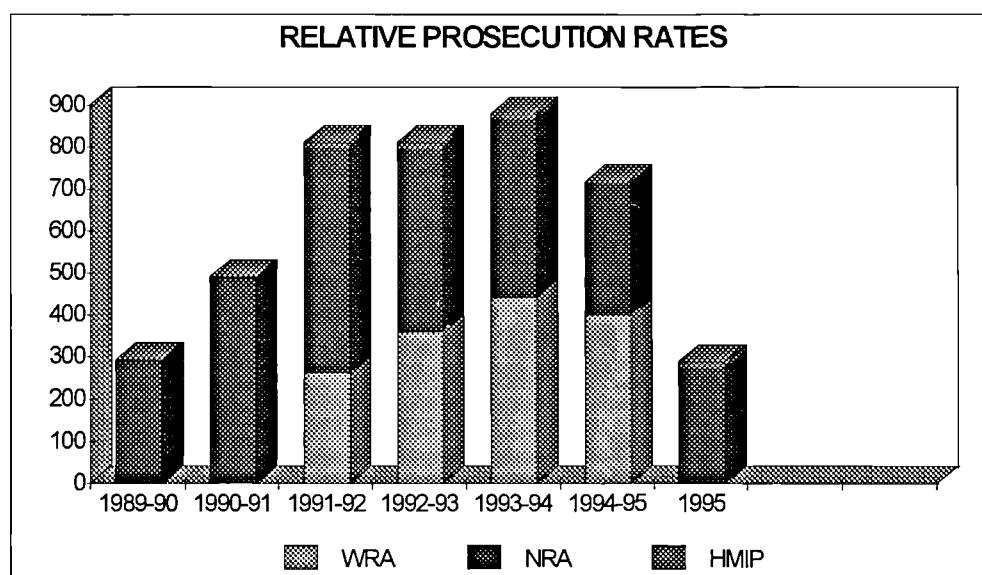
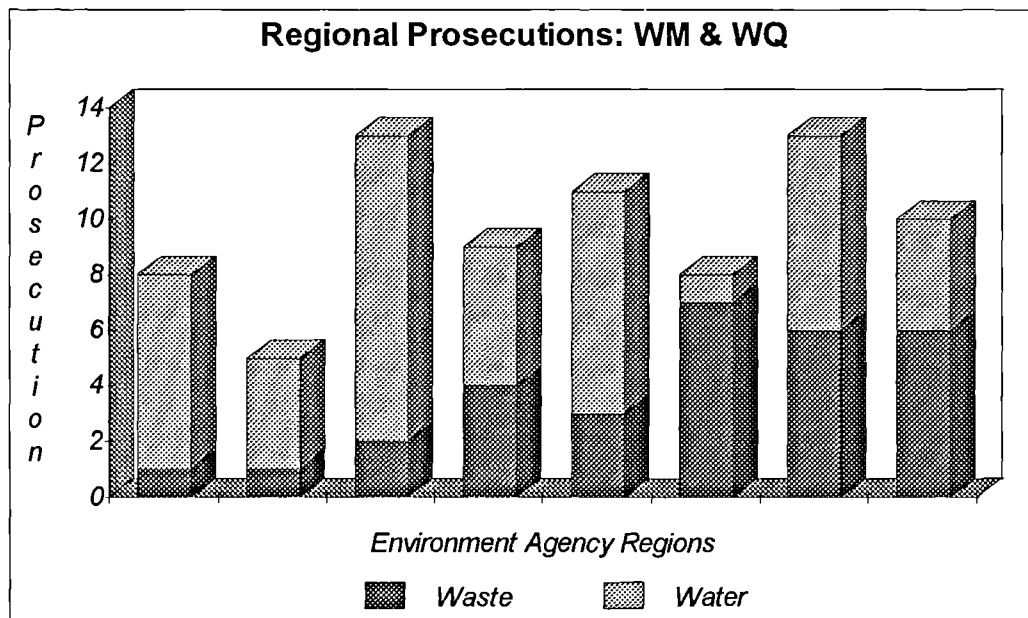


FIG 11.12
DISTRIBUTION OF ENVIRONMENTAL PROTECTION PROSECUTIONS
BROUGHT BY THE AGENCY OVER TWO MONTHS¹²



¹² This information is obtained from national Agency press releases.

FIG 11.13**Constitution of the Environment Agency's Legal Department - A Regional Breakdown**

Region	NRA	WRAs	HMIP	OTHER	NEW RECRUITS	TOTAL
North West	6*	.5**	0	0	3	8.5
North East	8	2	1	0	2	13
Midlands	8	0	1	0	3	12
Welsh						
Thames	3	2	0	0	5	10
Sussex	5	0	0	2	2	9
South West	5	3	0	0	0	8
Southern						
Bristol (Head Office)	4	2	1	0	1	8
TOTAL	39	9.5	3	2	16	68.5

* - two of these are part time staff.

** - part time member of staff.

FIG 11.14
WASTE REGULATION SURVEY 1997 - ENFORCEMENT STATISTICS

<u>Agency Offices Contacted/Replied*</u>		<u>Enforcement Action</u>	
1996-97		1995-96	
		Prosecutions/Cautions/Enforcement Notices	Prosecutions/Cautions/Enforcement Notices
<i>Anglian Region</i>			
<i>Bristol (HO)</i>			
Lincoln (Northern)*	0	0	0
Huntingdon (Central)			66
Suffolk (Eastern)			
<i>North West</i>			
<i>Warrington (HO)</i>			
Carlisle (Northern)*	0	2	0
Preston (Central)*	3		8
Southern (Sale)*	58	284	
<i>North East</i>			
<i>Leeds (HO)</i>			
Newcastle (Northumbria)*	12	12	1
York (Dales)			
Leeds (S Yorks)			76

<u>Agency Offices Contacted/Replied *</u>		<u>Enforcement Action</u>	
1996-97		1995-96	
Prosecutions/Cautions/Enforcement Notices		Prosecutions/Cautions/Enforcement Notices	
<i>Midlands</i>			
<i>Solihull (HO)</i>			
Shrewsbury (Upper Severn)			
Tewkesbury (Lower Severn)			
Lichfield (Upper Trent)			
Nottingham (Lower Trent)*	13	11	88
		57	15
			121
<i>Southern</i>			
<i>Sussex (HO)</i>			
Hampshire (Hants and IOW)*	16	19	8
Kent*	12	14	2
Sussex (Sussex Area)			0
			20
<i>South West</i>			
<i>Exeter (HO)</i>			
Bodmin (Cornwall)*	1	3	3
Exeter (Devon)*			n/avail
Somerset (N Wessex)*	8	7	8
Blandford (S Wessex)*	5	8	3
		4	2
			2

<u>Agency Offices Contacted/Replied *</u>		<u>Enforcement Action</u>	
1996-97		1995-96	
Prosecutions/Cautions/Enforcement Notices		Prosecutions/Cautions/Enforcement Notices	
<i>Thames</i>			
<i>Reading (HO)</i>			
Herts (N East)			
Middlesex (S East)*	12	8	22
Oxon (West)	3	2	
<i>Wales</i>			
<i>Cardiff (HO)</i>			
Gwynned (Northern)*	1	1	32
1(0)		0	
Cardiff (S East)			
Dyfed (S West)			
Total	141	127	376
(for 13 out of 26 offices)			
Forecast based on 50%	282	254	752**

**Figures from NW Southern Region were not received but are likely to greatly alter this figure.

FIG 11.15
MOBILISATION OF THE LAW - HOW THE AGENCY BECAME NOTIFIED OF THE OFFENCE

The following statistics were taken from press releases provided by the Agency (period 1 = all those issued from June to August 1997, and period 2 =):

<u>Region</u>	Prosecutions	Agency Inspection	Public Report	Company	Another Company	Other Company	Don't Know
1. South West	12	1	10	1	-	-	-
2. North East	9	5	1	1	-	-	2
3. Northern	11	5	4	1	1	-	-
4. Anglian	10	3	6	-	-	1	-
5. Thames	13	3	8	-	-	-	2
6. Welsh	5	1	4	-	-	-	-
7. Southern	10	1	5	-	2	-	2
8. Midlands	7	3	-	-	-	-	4
TOTAL	77	22(29%)	38(49%)	3(4%)	3(4%)	1(1%)	10(13%)



APPENDIX B

SURVEY OF ENVIRONMENT AGENCY OFFICERS



APPENDIX B

ENVIRONMENT AGENCY SURVEY - 1998

12.1 - SURVEY DESIGN & FEEDBACK

DESIGN CONSIDERATIONS

The original survey design was loosely based on an attitude scale used by Grabosky & Braithwaite in their Australian study of regulatory bodies (*'Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies'* (1986) OUP). These questions were thought to demand obvious responses, so the attitude scale was replaced with a survey asking respondents to rank several options in order of preference, in order to avoid loaded questions.

A. Omission of a 'Middle Position'

1. The availability of four or six positions of preference allows no middle position for the respondent, as it is felt this invites avoidance of the issues. Respondents are in effect forced to commit themselves to most preferred and least preferred options.
2. Similarly, the available responses do not provide a 'don't know' option. Here, the researcher is assuming that enforcement officers will have an opinion to express (whether it is a personal one or official Agency policy). Most people give some thought to issues which are germane to their occupation.
3. Research (Schulman & Presser (1981)) has suggested that those respondents who use the middle position performed the same as other respondents when denied that option (i.e. same proportion agreed and disagreed with the proposition in the survey). This indicates that the omission of a middle position does not make any difference to the results, unless the percentage of 'don't knows' or undecided, is in itself important to the research.

B. Closed Questions/Statements

The survey deliberately uses the closed question style. Closed questions are easier to code and to analyse, but much can be gained from offering the respondents the opportunity to elaborate their answers (see Section D of the survey).

C. Mode of Delivery

This was a postal survey, delivered to Agency field officers via their Regional Environmental Protection Managers.

D. Background Information

The survey controlled for the sex and age of respondents, but probably more importantly, the number of years of experience they had in environmental regulation. This may identify a difference between officers who have served in older regulatory bodies (e.g. the County Council Waste Regulation Authorities, Water Authorities, NRA) and those who are 'fresh' to the Agency.

E. Order Effects

Particular responses can be caused by the order of the propositions. An example of order effects is when the respondent feels they should be seen to be consistent and therefore respond to one statement in a particular way, not because it is the truth but because they feel it is consistent with their response to a previous statement. This is particularly a problem with statements which deal with closely related issues. This was addressed by spacing very similar statements as far apart as possible on the survey.

Authors of Schulman, H & Presser, S, 'Questions & Answers in Attitude Surveys.' (1981), Academic Press Inc., conducted experiments to test the order effect but found no significant results (p.33).

F. Feedback on the Survey/Design Faults

A few officers made comments on the survey design:

'In some instances it was difficult to rank the options because many were of equal importance - especially B1. The ranking does not fully indicate how little difference in importance there was between some answers.'

'As you highlighted at the start of the questionnaire ranking a number of closely related considerations is extremely difficult and this was undoubtedly the case here. Indeed, I am not particularly happy with some of the responses I have given, the inherent limitations of the ranking system. Perhaps it would have been better to have a system whereby a particular rank could be allocated to more than one option and/or comments could be added at the end of each question.'

It was felt that while giving officers the clear opportunity to comment/expand on their responses was very important, requiring them to explain or justify their response to each question would deter completion and adversely affect response rate. It was for this reason that the survey was restricted to ten questions in all. Nevertheless a smaller sample providing comments on all their responses may have provided more valuable results.

12.2 - Survey Completion by Region

Region	Number of Surveys Completed
North West	15
North East	33
Midlands	29
Welsh	0
Thames	7
Anglian	11
Southern	4
South West	0
Total	100

12.3 Survey Completion by Sector

Sector	Number of Surveys Completed
Waste Management	46
Water Pollution	33
IPC/RAS	21
Total	100

12.4 - The Survey Template

ENVIRONMENT AGENCY SURVEY

CONFIDENTIAL

Any results of this survey will be assessed as one of a batch of surveys. No survey will be singled out for analysis, and all individual responses will be treated as strictly confidential.

GENERAL

1. Age

2. Position (please indicate whether Waste Management, IPC or Water Quality):

3. Enforcement Functions

Do you work mainly with licensed or unlicensed sites?

4. Region

5. Employment History: Have you worked in environmental regulation before the commencement of the Environment Agency?

Y/N

If 'Yes,' please state the number of years spent in environmental regulation and with which bodies (e.g. NRA, HMIP, WRA, Waste Disposal Authority, etc.).

SECTION A

The following questions ask you to rank four options. To complete these questions, please give each option ((A) to (D)) a ranking from 1 - 4, using '1' for the option you feel is most important or true, and '4' for the option you view as least important or true.

The researcher appreciates that ranking a number of often closely related considerations is extremely difficult, but please attempt to complete the survey, paying closest attention to your choices of top and bottom ranks. See Section C for the opportunity to comment on your answers.

RESPONSES: 1-4

1. How do breaches of legal requirements come to your attention?

Rank the following means of discovering breaches according to their relative frequency.

- | | |
|-----------------------------------------------------------|-------|
| A) routine inspection | A)___ |
| B) the company concerned alerts us to an incident/breach | B)___ |
| C) a member of the public alerts us to an incident/breach | C)___ |
| D) another business alerts us to an incident/breach | D)___ |

2. When you visit a site and point to the breach of a legal requirement/licence condition (without threatening the offender with legal action), how does the company/individual react?

Rank the following responses with '1' as the most common response and '4' as the least common.

- | | |
|-------------------------------------------------------------------------------------------------------------------|-------|
| A) they attempt to rectify the breach as soon as they are made aware of it | A)___ |
| B) they fail to improve matters until formal pressure (e.g. a written warning or notice) is applied by the Agency | B)___ |
| C) they ignore Agency instructions until they are left with no other option | C)___ |
| D) other | D)___ |

3. What is your own personal view as to the significance of a high number of prosecutions being brought by a regulatory body?

A) as an indicator that the regulator has failed to achieve enforcement by other means

A)_____

B) as an indicator that the regulator is proving to be successful and powerful

B)_____

C) as indicating nothing in particular/none of the above

C)_____

D) other (please indicate)

D) _____

SECTION B

The following questions ask you to rank six options. To complete these questions, please give each option ((A) to (F)) a ranking from 1 - 6, using '1' for the option you feel is most important or true, and '6' for the option you view as least important or true.

RESPONSES: 1-6

1. How would you rate the importance of the following functions of the Environment Agency? Use '1' to indicate its primary function.

- | | |
|-------------------------------------------------------------------------------------------|---------|
| A) achieving environmental compliance | A)_____ |
| B) preventing environmental damage | B)_____ |
| C) punishing those who do not comply with the legal requirements | C)_____ |
| D) responding to public concerns | D)_____ |
| E) maintaining a balance between environmental improvement and economic development | E)_____ |
| F) providing a source of advice and education with regard to good environmental practice. | F)_____ |

2. From your general experiences, rank the following motives/reasons for breaches of environmental regulation, with the one you feel to be the most common as '1', and the least common as '6.'

- | | |
|-------------------------------------------------------------------------------------------|---------|
| A) profit seeking or the will to avoid extra operational costs | A)_____ |
| B) incompetence of the individual or the management system of the organisation as a whole | B)_____ |
| C) unavoidable accident | C)_____ |
| D) ignorance of legal requirements | D)_____ |
| E) disagreement with the law's requirements | E)_____ |
| F) a small risk of being prosecuted. | F)_____ |

3. Rank the following consequences of prosecution by the Agency in order of their importance (assuming the defendant is convicted).

- A) the penalty imposed by the court A)_____
- B) adverse publicity for the defendant B)_____
- C) the shame/embarrassment of appearing in court C)_____
- D) demonstrating to society that the regulator is a tough regulator D)_____
- E) recovery of Agency costs E)_____
- F) use of company resources to defend the prosecution F)_____

4. Rank the following according to how frequently you feel they influence the decision to prosecute in your field of regulation. Use '1' for the consideration which you feel features most frequently in decisions to prosecute.

- A) the punishment of unresponsive offenders; A)_____
- B) when there is a view that a heavy penalty will be imposed; B)_____
- C) where there is at least some fault e.g. negligence or knowing breach by the defendant; C)_____
- D) where there is potential for harm to the environment or public health, regardless of whether the defendant was obviously careless; D)_____
- E) when the defendant has been formally warned or advised to improve its practices; E)_____
- F) when the defendant has committed the same breach more than once. F)_____

5. How would you rank the importance of the following for the Environment Agency?

- A) *industry* should see the Agency as *flexible* and willing to compromise A)_____
- B) *industry* should see the Agency as a *reasonable regulator* B)_____
- C) *industry* should see the Agency as a *strict regulator* C)_____
- D) the *public* should see the Agency as *independent* from industry D)_____
- E) the *public* should see the Agency as a *strict regulator* E)_____
- F) the *public* should see the Agency as a *reasonable regulator*. F)_____

6. How would you rank the importance of the following actions by your department, in achieving compliance with the law?

- | | |
|--------------------------------------------------------------------------------------------|---------|
| A) education of companies and individuals | A)_____ |
| B) persuasion to comply with legal requirements by highlighting the benefits of compliance | B)_____ |
| C) prosecution | C)_____ |
| D) threatening formal action, verbally or by written warning | D)_____ |
| E) issuing enforcement notices | E)_____ |
| F) recommending or suggesting means for improvement. | F)_____ |

SECTION C

This question asks you to mark only two options as the factors which you personally feel to most strongly support court action.

Pollutachem Ltd, a solvents manufacturing company, employs eight people. Its factory is situated on the bank of the River Gwyne. On 7 July, a tank of solvent overflowed into the River Gwyne.

On this set of facts, which **two** of the following factors would you choose as the strongest indicators that prosecution of Pollutachem Ltd may be appropriate?

- A) Agency officer Barratt found ten fish floating on the surface of the river, killed by the effects of the solvent.
- B) A similar incident had happened 12 months ago at the Pollutachem site.
- C) The company had no alarm system to warn plant operators of an overflow.
- D) The company did not report the incident themselves, although they had identified the problem 24 hours before Agency officers discovered it.
- E) Public feeling in the locality is high. Twenty individuals reported the incident to the Agency.
- F) After the first incident, the Agency sent a warning letter to Pollutachem six months ago suggesting that an alarm system be installed to warn staff of a potential overflow to the river.

SECTION D (Optional)

1. Additional Comments

If you feel that the available responses did not properly reflect your views, or you wish to elaborate any of your answers, please add your own comments here.

12.5 Questions for Structured Interviews

1. Inspection frequencies - how do you decide how often to make site inspections?
2. Public reaction - can you think of any instances where enforcement action has been taken because of public reaction or demand, or where the public have shown concern which is not proportionate to the environmental risk?
3. Once a violation of the law has been identified, who starts off the chain in recommending or suggesting prosecution?
4. What are/were your perceptions of the other regulators? HMIP, NRA, WRAs
5. What has changed in your department since April 1996?
6. Are the courts generally supportive of Agency prosecutions?
7. What are your views on the proper way for the Agency to achieve compliance with the law?
8. What moves have you seen towards integration of the functions of Water Quality, Waste Management and IPC?

Other questions were fed in as issues arose, relating more to practical matters such as, what role do the Scheme of Delegation meetings play in the decision to prosecute.

12.6 Breakdown of Survey Results

SECTION A

**1. How do breaches of legal requirements come to your attention?
Rank the following means of discovering breaches according to
their relative frequency.**

- A) routine inspection
- B) the company concerned alerts us to an incident/breach
- C) a member of the public alerts us to an incident/breach
- D) another business alerts us to an incident/breach.

<i>Source of knowledge of compliance levels</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Inspection	(24) 52.1%	(19) 57.5%	(5) 23.8%
B. Company	(2) 4.3%	(1) 3.0%	(14) 66.6%
C. Public	(19) 41.3%	(15) 45.4%	(2) 9.5%
D. Another Business	(1) 2.1%	-	-

2. When you visit a site and point to the breach of a legal requirement/licence condition (without threatening the offender with legal action), how does the company/individual react?

Rank the following responses with '1' as the most common response and '4' as the least common.

- A) they attempt to rectify the breach as soon as they are made aware of it
- B) they fail to improve matters until formal pressure (e.g. a written warning or notice) is applied by the Agency
- C) they ignore Agency instructions until they are left with no other option
- D) other

<i>Responsiveness of Operators</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Attempt to rectify	(32) 76.1%	(26) 81.2%	(19) 95.0%
B. Fail to improve	(7) 16.6%	(5) 15.6%	-
C. Ignore instructions	-	-	-
D. Other	(3) 7.1%	(1) 3.1%	(1) 5.0%

3. What is your own personal view as to the significance of a high number of prosecutions being brought by a regulatory body?

- A) as an indicator that the regulator has failed to achieve enforcement by other means
- B) as an indicator that the regulator is proving to be successful and powerful
- C) as indicating nothing in particular/none of the above
- D) other (please indicate)

<i>Significance of Prosecutions</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Regulator Failed	(13) 34.2%	(12) 42.8%	(10) 50.0%
B. Powerful Regulator	(12) 28.9%	(8) 28.5%	-
C. Nothing in particular	(7) 18.4%	(8) 28.5%	(7) 35.0%
D. Other	(10) 26.5%	-	(3) 15.0%

SECTION B

1. How would you rate the importance of the following functions of the Environment Agency? Use '1' to indicate its primary function.

- A) achieving environmental compliance
- B) preventing environmental damage
- C) punishing those who do not comply with the legal requirements
- D) responding to public concerns
- E) maintaining a balance between environmental improvement and economic development
- F) providing a source of advice and education with regard to good environmental practice.

<i>Function of the Agency</i>	Waste Management	Water Pollution	IPC/RAS
A. Compliance	(5) 11.3%	(2) 6.2%	(2) 9.5%
B. Preventing Damage	(31) 70.4%	(23) 71.8%	(13) 61.9%
C. Punishing	-	-	-
D. Responding to Public	(1) 2.2%	(1) 3.1%	-
E. Maintaining balance between environment and economy	(6) 13.6%	(5) 15.6%	(6) 28.5%
F. Advice and education	(1) 2.2%	(1) 3.1%	-

2. From your general experiences, rank the following motives/reasons for breaches of environmental regulation, with the one you feel to be the most common as '1', and the least common as '6.'

- A) profit seeking or the will to avoid extra operational costs
- B) incompetence of the individual or the management system of the organisation as a whole
- C) unavoidable accident
- D) ignorance of legal requirements
- E) disagreement with the law's requirements
- F) a small risk of being prosecuted.

<i>Reasons/Motives for Non-compliance</i>			
	Waste Management	Water Pollution	IPC/RAS
A. Profit seeking	(33) 75.0%	(4) 12.9%	(1) 4.7%
B. Incompetence	(7) 15.9%	(19) 61.2%	(13) 61.9%
C. Unavoidable accident	(2) 4.5%	(5) 16.1%	(7) 33.3%
D. Ignorance of law	(2) 4.5%	(2) 6.4%	-
E. Disagreement	-	-	-
F. Small risk of prosecution	-	(1) 3.2%	-

3. Rank the following consequences of prosecution by the Agency in order of their importance (assuming the defendant is convicted).

- A) the penalty imposed by the court
- B) adverse publicity for the defendant
- C) the shame/embarrassment of appearing in court
- D) demonstrating to society that the regulator is a tough regulator
- E) recovery of Agency costs
- F) use of company resources to defend the prosecution.

<i>Impact of Prosecution</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Judicial penalty	(14) 30.4%	(5) 15.6%	(1) 5.0%
B. Publicity	(17) 36.9%	(15) 46.8%	(16) 80%
C. Shame/embarrassment	(2) 4.7%	(5) 15.6%	-
D. Demonstration to society	(13) 28.2%	(7) 21.8%	(3) 15%
E. Costs recovery	-	-	-
F. Defence costs	-	-	-

4. Rank the following according to how frequently you feel they influence the decision to prosecute in your field of regulation. Use '1' for the consideration which you feel features most frequently in decisions to prosecute.

- A) the punishment of unresponsive offenders
- B) when there is a view that a heavy penalty will be imposed
- C) where there is at least some fault e.g. negligence or knowing breach by the defendant
- D) where there is potential for harm to the environment or public health, regardless of whether the defendant was obviously careless
- E) when the defendant has been formally warned or advised to improve its practices
- F) when the defendant has committed the same breach more than once.

<i>Public Interest Factors</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Punishment	(4) 10.5%	(1) 3.3%	(2) 10.0%
B. Heavy Penalty	-	-	-
C. Fault	(2) 5.2%	(5) 16.6%	(3) 15.0%
D. Harm or potential harm	(14) 36.8%	(12) 40.0%	(7) 35.0%
E. Earlier warning/advice	(9) 23.6%	(9) 30.0%	(6) 30.0%
F. Record of non-compliance	(9) 23.6%	(10) 10.0%	(2) 5.0%

5. How would you rank the importance of the following for the Environment Agency?

- A) *industry* should see the Agency as *flexible* and willing to compromise
- B) *industry* should see the Agency as a *reasonable regulator*
- C) *industry* should see the Agency as a *strict regulator*
- D) the *public* should see the Agency as *independent* from industry
- E) the *public* should see the Agency as a *strict regulator*
- F) the *public* should see the Agency as a *reasonable regulator*.

<i>Image Management</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Flexible	-	(1) 3.1%	-
B. Reasonable	(8) 20.0%	(8) 25.0%	(7) 33.3%
C. Strict	(5) 12.5%	-	-
D. Independent	(16) 40.0%	(13) 40.6%	(10) 47.6%
E. Strict	(7) 17.5%	(4) 12.5%	(2) 9.5%
F. Reasonable	(4) 10.0%	(6) 18.7%	(1) 4.7%

6. How would you rank the importance of the following actions by your department, in achieving compliance with the law?

- A) education of companies and individuals
- B) persuasion to comply with legal requirements by highlighting the benefits of compliance
- C) prosecution
- D) threatening formal action, verbally or by written warning
- E) issuing enforcement notices
- F) recommending or suggesting means for improvement.

<i>Preferred Enforcement Mechanisms</i>			
	Waste Management	Water Pollution IPC/RAS	
A. Education	36.9%	51.5%	28.5%
B. Persuasion	19.5%	33.3%	33%
C. Prosecution	6.5%	-	-
D. Warnings	4.3%	3%	9.5%
E. Notice serving	-	-	-
F. Recommending improvements	23.9%	15.1%	28.5%

<i>Preferred Enforcement Mechanisms for 'New' and 'Old' Inspectors'</i> ¹		
	'New' Inspectors	'Old' Inspectors
A. Education	53.3%	37.6%
B. Persuasion	20%	28.2%
C. Prosecution	0%	3.5%
D. Warnings	13.3%	2.3%
E. Notice serving	6.6%	0%
F. Recommending improvements	6.6%	29.4%

¹'New' inspectors are those who have less than three years experience in environmental regulation and constituted 15% (15) of the total survey population. These inspectors would have received most if not all of their 'on the job' training with the Agency.



APPENDIX C

OBSERVED PROSECUTIONS



FIG 13.1
LIST OF COURT HEARINGS ATTENDED

<i>Date</i>	<i>Venue & Type</i>	<i>Hearing Description</i>	<i>Indicators of Fault/Previous Incidents</i>
11.95	Wolverhampton Mag. Water/incident	Release of raw sewage to brook during storm. Guilty Plea s.85 WRA 1991	failure to properly man the control room/ previous convictions.
2.97	Ormskirk Mag. Water/incident	purple dye causing discoloration of sluice. Guilty Plea s.85(1) WRA 1991	purple stain indicated previous discharges/should have known destination of discharge.
2.97	Wolverhampton Cr. Waste/technical breach	Deposit of 13 x permitted volume of waste at licensed transfer station Not Guilty Plea: s.33 EPA 1990. Appeal against conviction and sentence	previous convictions.
4.97	Knowsley Mag. Water/incident	Oil pollution arising after delivery of heating oil to local authority premises	previous convictions.
4.97	Chorley Mag. Water/incident	Silt pollution arising from de-watering of quarry lagoon.	earlier warning.

<i>Date</i>	<i>Venue</i>	<i>Hearing Description</i>	<i>Indicators of Fault/Previous Incidents</i>
5.97	Preston Cr. Waste/technical breach	Non-compliance with licence conditions for 3 years. s.33 EPA 1990 Appeal against sentence	repeat offending.
5.97	Warrington Mag. Waste/technical breach	Consignments of halogen compound wastes to unauthorised landfill Not Guilty plea: ss.33 &34 EPA 1990	tampering with duty of care documents/did not take reasonable steps to ascertain contents of waste.
6.97	Northwich Mag. Water/incident	Release of silage to canal causing fishkill.	no previous conviction/ previous incidents?
6.97	Blackburn Mag. Water/incident	Prosecution of developers for breach of discharge consent	
7.97	Widnes Mag. IPC/incident	Release of vinylidene chloride to canal. GP - ss.6(1)/23(1)(a) EPA 1990.	failure to maintain plant and equipment
8.97	Rochdale Mag. Water/incident	Release of detergent to river GP - 85(3) WRA 1991.	??
8.97	Northwich Mag. Waste/unlicensed	Operation of waste transfer site without a licence	three years operating without a licence/ongoing offence.

<i>Date</i>	<i>Venue</i>	<i>Hearing Description</i>	<i>Indicators of Fault/Previous Incidents</i>
8.97	Carlisle Mag. Water/incident	Release of sheepdip to river tributary.	
9.97	Chester Mag. Water/incident	Release of landfill leachate to tributary of river. NGP - 85(1) and 85(6) WRA 1991.	failure to supervise pumping operations/several verbal warnings.
10.97	St Helens Mag. Water/incident	Release of red diesel to brook NGP - 85(1) WRA 1991.	ongoing offence/failed to familiarise selves with pipework.
10.97	Knowsley Mag. Water/incident	Release of maize starch to river system. GP - 85(1) WRA 1991.	failure to notify Agency promptly /cautioned for previous offence.
12.97	Widnes Mag. Water/incident	Release of chloroform to ground and canal. GP - 85(1) WRA and 6(1) and 23(1) EPA 1990.	inadequate risk management/ previous incidents of same type of spillage.
12.97	Widnes Mag. Rod Licences	11 unlicensed angling cases.	none presented.
2.98	Lancaster Mag. Waste/unlicensed	Permitting deposit of waste on farmland and encroachment into beck. GP - s.33(1) EPA 1990.	repeated offence.

<i>Date</i>	<i>Venue</i>	<i>Hearing Description</i>	<i>Indicators of Fault/Previous Incidents</i>
2.98	Lancaster Mag. Waste/unlicensed	Burning waste. NGP - s.33(1) EPA 1990.	obstruction of Agency officers (aggravated).
3.98	Warrington Cr. IPC/incident	Release of chloroform to water and ground. GP - ss.6(1) & 23(1) EPA 1990.	failure to identify weaknesses in the system.
3.98	Northwich Mag. IPC/incident	Violet plume above incinerator. GP - ss.6(1) and 23(1) EPA 1990.	failure to identify iodine before incineration/ previous incident.
4.98	Stockport Mag. Water/incident	46 hour release of raw sewage to brook. GP - s.85(1) WRA 1991.	failure to notify Agency.
5.98	Widnes Mag. IPC/incident	Release of trichloroethylene to water, air and ground. GP - s.6(1) and 23(1) (a) EPA 1990.	prior knowledge of weaknesses in in system which caused the incident



APPENDIX D

POLICY STATEMENTS



14.1 Environment Agency Draft Management Statement: 6 December 1995

This document expresses six principles which inform the Agency's objectives and policy background;

- To provide effective environmental protection management and enhancement, particularly in ways which take account of impacts on all aspects of the environment.
- To impose the minimum burden on industry and other consistent with the above, by developing single points of contact through which industry and others can deal with the Agency.
- To operate to high professional standards, based on the best possible information and analysis of the environment and of processes which affect it.
- To organise its activities in ways which reflect good environmental practice and provide value for money for those who pay its charges and for taxpayers as a whole.
- To provide clear and readily available advice and information on its work.
- To develop a close and responsible relationship with the public, local communities and regulated organisations.

14.2 Waste Management Paper IV 1994: Site Inspection Frequency Guidelines

Weekly:

- Household, Commercial and/or Industrial Waste Landfill
- Treatment Plants
- Household, Commercial and/or Industrial waste Transfer Stations
- Household Waste Civic Amenity Sites

Fortnightly:

- Landfill and Transfer Stations taking non-biodegradable wastes.

Monthly:

- Industrial Waste Landfill (factory curtilage)
- Scrapyards

14.3 Categorisation of Water Pollution Incidents¹

Category 1

A major incident involving one or more of the following:

- **potential or actual persistent effect on water quality and aquatic life;**
- **closure of potable, industrial or agricultural abstraction necessary;**
- **extensive fish kill;**
- **excessive breaches of consent conditions;**
- **instigation of extensive remedial measures;**
- **significant adverse effect on a site of conservation importance.**

Category 2

A significant incident which involves one or more of:

- **notification of abstractors necessary;**
- **significant fish kill;**
- **readily observable effects on invertebrate life;**
- **water unfit for stock watering;**
- **bed of watercourse contaminated; and**
- **amenity value to downstream users reduced by odour or appearance**

Category 3

A minor incident resulting in localised environmental impact only. Some of the following may apply:

- **notification of abstractors necessary;**
- **fish kill of less than 10 fish;**
- **no readily observable effect on invertebrate life;**
- **water not unfit for stock watering;**
- **bed of watercourse only locally contaminated; and**
- **minimal environmental impact and amenity value only marginally affected.**

Category 4*

A reported pollution incident which upon investigation proves to be unsubstantiated, i.e. no evidence can be found of a pollution incident having occurred.

(* this category was added in Water Pollution Incidents 1995. Previously, category 3 had read simply 'no notable effect' and had thus included unsubstantiated incidents.)

¹ See National Rivers Authority (1994). *Discharge Consents and Compliance Strategy*. HMSO.

14.4 : ENVIRONMENT AGENCY - DRAFT PROSECUTION POLICY: 9/96

In deciding whether to prosecute the Environment Agency will follow this policy and, where relevant, the Code for Crown Prosecutors.

General Principles

The Agency recognises that the institution of prosecution proceedings is a serious matter. The following factors should be considered in deciding whether to prosecute. The factors are not exhaustive since each case is unique and must be considered on its merits. The factors which apply will depend on the facts of each case. A prosecution should only be instigated where sufficient evidence exists and it is in the public interest to do so.

There are two stages -

- is a prosecution in the public interest; and*
- is there evidence sufficient for there to be a reasonable prospect of conviction?*

Is a prosecution in the public interest?

A person should only be prosecuted if it is in the public interest to do so. In general; the more serious an offence, the more likely it is that a prosecution will be required in the public interest. A prosecution in such cases will normally be justified unless there are factors tending against prosecution which clearly outweigh those tending in favour.

Factors to consider in favour of prosecution (the relevance of which will vary depending on the offence) include -

Actual or potential environmental impact

- the degree of impact on the environment which has or could have resulted from the offence;*
- the degree of harm to human health, flora or fauna;*
- the degree of nuisance.*

The culpability, attitude and motivation of the defendant

- whether the offence was deliberate, reckless or involved a degree of carelessness;*
- whether the offence could have been foreseen and what steps the defendant took to avoid the occurrence;*
- whether the offence was motivated by considerations of financial gain or to obtain competitive advantage;*
- whether the offender has a record of non-compliance or has previous convictions/cautions for offences of a similar nature;*

- *whether there are grounds for believing that the offence is likely to be continued or repeated;*
- *whether the offender obstructed Agency staff in their attempts to minimise any environmental impact or to investigate the alleged offence;*
- *whether the offence involved dishonesty, such as the falsification of records or licences;*
- *disregard of statutory requirements or regulatory controls, such as environmental licences.*

Categorisation of the incident

Where the Agency has a policy in relation to categories of pollution (such as those in respect of water pollution) the factors in this document should be applied in conjunction with that policy.

Other public interest factors

- *the prevalence of the offence either locally or nationally;*
- *the attitude of the local community and the effect on the public.*

Public interest factors against prosecution (which carry less weight if the offence is a serious one) include -

- *where the court is likely to impose only a nominal penalty;*
- *where the offence arose as a result of a genuine mistake or misunderstanding*
- *where the environmental impact was minor and was the result of a single incident;*
- *where equipment had a latent defect which could not reasonably have been discovered by a competent operator;*
- *where the offence was caused by the intervening act of a third party which could not have been reasonably guarded against;*
- *the defendant has co-operated fully with the Agency and is able to demonstrate that significant preventative and remedial measures have been taken;*
- *where there has been a long delay between the offence and the decision to prosecute (except where the investigation has been complex, the offence has only recently come to light or for some other good reason).*

Sufficiency of Evidence

A Prosecution should not be commenced or continued unless the Agency is satisfied that there is admissible, sufficient and reliable evidence that the alleged offence has been committed. Once it has been decided to recommend that it is in the public interest to prosecute or issue a formal caution, the Agency's lawyers will consider whether there is sufficient evidence for there to be a reasonable prospect of conviction.

14.5: Enforcement and Prosecution Policy
(Published 1st November 1998).

INTRODUCTION

1. The Environment Agency's aim is to provide a better environment for England and Wales both for the present and for the future. It will achieve much of this through education, by providing advice and by regulating the activities of others. Securing compliance with legal regulatory requirements, using enforcement powers including prosecution, is an important part of achieving this aim.
2. The Agency's functions are extensive. They include pollution control, waste regulation, the management of water resources, flood defence, fisheries, conservation and navigation. The activities dealt with range from the regulation of recreational pursuits to the most complicated industrial processes.
3. Agency staff work with Local Government and other Regulators on matters such as planning, air pollution, public health and occupational safety to ensure coherent regulation. They also work with many conservation bodies, voluntary groups and non governmental organisations in order to achieve common goals.
4. The Agency regards prevention as better than cure. It offers information and advice to those it regulates and seeks to secure co-operation avoiding bureaucracy or excessive cost. It encourages individuals and businesses to put the environment first and to integrate good environmental practices into normal working methods.
5. This policy sets out the general principles which the Agency intends to follow in relation to enforcement and prosecution. It is to be used in conjunction with more detailed specific guidance for staff in respect of each of the Agency's functions. The implementation and effectiveness of the policy will be monitored by the Agency.

PURPOSE AND METHODS OF ENFORCEMENT

6. The purpose of enforcement is to ensure that preventative or remedial action is taken to protect the environment or to secure compliance with a regulatory system. The need for enforcement may stem from an unlicensed 'incident' or from a breach of the conditions of a licensed activity. Although the Agency expects full voluntary compliance with relevant legislative requirements and licence provisions, it will not hesitate to use its enforcement powers where necessary.
7. The powers available include enforcement notices and works notices (where contravention can be prevented or needs to be remedied), prohibition notices (where there is an imminent risk of serious environmental damage), suspension or revocation or environmental licences, variation of licence conditions,

injunctions and the carrying out of remedial works. Where the Agency has carried out remedial works, it will seek to recover the full costs incurred from those responsible.

8. Where a criminal offence has been committed, in addition to any other enforcement action, the Agency will consider instituting a prosecution, administering a caution or issuing a warning.

PRINCIPLES OF ENFORCEMENT

9. **The Agency believes in firm but fair regulation.** Underlying the policy of firm but fair regulation are the principles of, *proportionality* in the application of the law and in securing compliance, *consistency* of approach, *transparency* about how the Agency operates and what those regulated may expect from the Agency, and *targeting* of enforcement action.

Proportionality

10. In general, the concept of proportionality is included in much of the regulatory system through the balance of action to protect the environment against risks and costs.

11. Some incidents or breaches of regulatory requirements cause or have the potential to cause serious environmental damage. Others may interfere with people's enjoyment or rights, or the Agency's ability to carry out its activities. The Agency's first response is to prevent harm to the environment from occurring or continuing. The enforcement action taken by the Agency will be proportionate to the risks posed to the environment and to the seriousness of any breach of the law.

Consistency

12. Consistency means taking a similar approach in similar circumstances to achieve similar ends. The Agency aims to achieve consistency in, advice tendered, the response to pollution and other incidents, the use of powers and decisions on whether to prosecute.

13. However, the Agency recognises that consistency does not mean simple uniformity. Officers need to take account of many variables; the scale of environmental impact, the attitudes and actions of management and the history of previous incidents or breaches. Decisions on enforcement action are a matter of professional judgement and the Agency, through its officers, needs to exercise discretion. The Agency will continue to develop arrangements to promote consistency including effective arrangements for liaison with other enforcing authorities.

Transparency

14. Transparency is important in maintaining public confidence in the Agency's ability to regulate. It means helping those regulated and others, to understand what is expected of them and what they should expect from the Agency. It also means making clear why an officer intends to, or has taken enforcement action.

15. Transparency is an integral part of the role of Agency officers and the Agency continues to train its staff and to develop its procedures to ensure that:-

- where remedial action is required, it is clearly explained (in writing, if requested) why the action is necessary and when it must be carried out; a distinction being made between best practice advice and legal requirements.
- opportunity is provided to discuss what is required to comply with the law before formal enforcement action is taken, unless urgent action is required, for example, to protect the environment or to prevent evidence being destroyed.
- where urgent action is required, a written explanation of the reasons is provided as soon as practicable after the event.

Targeting

16. Targeting means making sure that regulatory effort is directed primarily towards those whose activities give rise to or risk of serious environmental damage, where the risks are least well controlled or against deliberate or organised crime (*sic*). Action will be primarily focused on lawbreakers or those directly responsible for the risk and who are best placed to control it.

17. The Agency has systems for prioritising regulatory effort. They include the response to complaints from the public about regulated activities, the assessment of the risks posed by a licence holder's operations and the gathering and acting on intelligence about illegal activity.

18. In the case of regulated industries, management actions are important. Repeated incidents or breaches of regulatory requirements which are related may be an indication of an unwillingness to change behaviour or an inability to achieve sufficient control and may require a review of the regulatory requirements, the actions of the Operator and additional investment. A relatively low hazard site or activity poorly managed has potential for greater risk to the environment than a higher hazard site or activity where proper control measures are in place. There are, however, high hazard sites (for example, nuclear installations, some major chemical plants or some waste disposal facilities) which will receive regular visits so that the Agency can be sure that remote risks continue to be effectively managed. The Agency will continue to develop models and tools to enable risk to be assessed and compared.

PROSECUTION

Purpose

19. The use of the criminal process to institute a prosecution is an important part of enforcement. It aims to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others. It follows that it may be appropriate to use prosecution in conjunction with other available enforcement tools, for example, a prohibition notice requiring the operations to stop until certain requirements are met. Where the circumstances warrant it, prosecution without proper warning or recourse to alternative sanctions will be pursued.

20. The Agency recognises that the institution of a prosecution is a serious matter that should only be taken after full consideration of the implications and consequences. Decisions about prosecution will take account of the Code for Crown Prosecutors.

Sufficiency of Evidence

21. A prosecution will not be commenced or continued by the Agency unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction. If the case does not pass this evidential test, it will not go ahead, no matter how important or serious it may be. Where there is sufficient evidence, a prosecution will not be commenced or continued by the Agency unless it is in the public interest to do so. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender.

Public Interest Factors

22. The Agency will consider the following factors in deciding whether or not to prosecute:

- **environmental effect** of the offence,
- **foreseeability** of the offence or the circumstances leading to it,
- **intent** of the offender, individually and/or corporately,
- **history of offending**,
- **attitude** of the offender,
- **deterrent effect** of a prosecution, on the offender and others
- **personal circumstances** of the offender

23. The factors are not exhaustive and those which apply will depend on the particular circumstances of each case. Deciding on the public interest is not simply a matter of adding up the number of factors on each side. The Agency will decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

Companies and Individuals

24. Criminal proceedings will be taken against those persons responsible for the offence. Where a Company is involved, it will be usual practice to prosecute the Company where the offence resulted from the Company's activities. However, the Agency will also consider any part played in the offence by the officers of the Company, including Directors, Managers and the Company Secretary. Action may also be taken against such officers (as well as the Company) where it can be shown that the offence was committed with their consent, was due to their neglect or they 'turned a blind eye' to the offence or the circumstances leading to it. In appropriate cases, the Agency will consider seeking disqualification of Directors under the Companies Act.

Choice of Court

25. In cases of sufficient gravity, for example serious environmental damage over a wide area, where circumstances allow, consideration will be given to requesting the magistrates to refer the case to the Crown Court. The same factors as listed in paragraph 22 (above) will be used, but including consideration of the sentencing powers of the Magistrates' Court.

Penalties

26. The existing law gives the courts considerable scope to punish offenders and to deter others. Unlimited fines and, in some cases, imprisonment may be imposed by the higher courts. The Agency will continue to raise the awareness of the courts to the gravity of many environmental offences and will encourage them to make full use of their powers. Examples of penalties presently available to the courts for certain environmental offences are:-

- Magistrates' Courts; up to 6 months imprisonment and /or £20,000 fine
- Crown Court; up to 5 years imprisonment and/or an unlimited fine.

27. The Agency will always seek to recover the costs of investigation and Court proceedings.

Presumption of Prosecution

28. Where there is sufficient evidence, the Agency will normally prosecute in any of the following circumstances:-

incidents or breaches which have significant consequences for the environment. The Agency also takes seriously such incidents with potential for significant consequences.

carrying out operations without a relevant licence. It is a pre-requisite to successful regulation that those that are required to be regulated come within the appropriate licensing system.

excessive or persistent breeches of regulatory requirements in relation to the same licence or site.

failure to comply or to comply adequately with formula remedial requirements. It is unacceptable to ignore remedial requirement and unfair to those who do take action to comply.

reckless disregard for management or quality standards. It is in the interests of all that irresponsible operators are brought into compliance or cease operations.

failure to supply information without reasonable excuse or knowingly or recklessly supplying false or misleading information. It is essential that lawful requests for information by the Agency are complied with and that accurate information is always supplied to enable informed regulation to be exercised.

obstruction of Agency staff in carrying out their powers. The Agency regards the obstruction of, or assaults on, its staff while lawfully carrying out their duties as a serious matter.

impersonating Agency staff. The Agency requires impersonation of staff, for example, in order to gain access to premises wrongfully, as a serious matter.

Alternatives to Prosecution

29. In cases where a prosecution is not the most appropriate course of action, the alternatives of a caution or warning will be considered, the choice depending on the factors referred to above.

30. A caution is the written acceptance by an offender that they have committed an offence and may only be used where a prosecution could properly have been brought. It will be brought to the Court's attention if the offender is convicted of a subsequent offence.

31. A warning is a written notification that, in the Agency's opinion, an offence has been committed. It will be recorded and may be referred to in subsequent proceedings.

32. As with a prosecution, additional enforcement mechanisms may also be used in conjunction with a caution or warning.

Working with other Regulators

33. Where the Agency and another enforcement body both have the power to prosecute, the Agency will liaise with that other body, to ensure effective co-ordination, to avoid inconsistencies, and to ensure that any proceedings instituted are for the most appropriate offence.



APPENDIX E

SUMMARY OF ENFORCEMENT MECHANISMS



15.1 FORMAL /INFORMAL ENFORCEMENT MECHANISMS

- **Education** - this can be generalised or specific. An example of general education is provided by a region of the old NRA which persuaded a local agricultural college to include farm pollution issues in their syllabus.¹ The Agency (and the National Rivers Authority) produced a series of videos visit individual companies to give presentations to their staff on specific pollution issues²
- **Persuasion** - officers can act as advocates pointing out the long term benefits of site improvements without actually demanding a change in practice.
- **Instruction** - while in theory officers may instruct an operator to comply with legal requirements, it is thought they must only do so by formal notice.³
- **Compliance Certificates & Risk Assessment** - The system of compliance certificates is increasingly becoming a formal part of the 'enforcement' hierarchy. Voluntary environmental compliance certificates such as EMAS (the European standard) and ISO 14001 (the international standard) commit companies to three yearly audits assessing companies' environmental performance by their rate of improvement rather than by objective criteria.
- 'Formal enforcement mechanisms' include in order of severity;
- **Suspension or Revocation of Licences** - in waste regulation, licences can be suspended or revoked where the holder ceases to be a fit and proper person.⁴ One waste officer commented that he felt an operator would not be labelled 'unfit' even after two to three prosecutions. The provisions for IPC and water allowed revocation only where the licence was effectively defunct or according to Secretary of State direction.⁵ Revocation is exceedingly rare, probably because the effect is potentially more severe than prosecution, as it is, in effect, an incapacitation of the offender.
- **Prohibition Notices** - where continuation of a licensed process involves imminent risk of serious pollution, the Agency can serve a notice requiring removal of the risk. This power seems to be non-existent in waste management.⁶ Again, the prohibition notice is an incapacitative measure, although court action may be necessary for its strict enforcement. As with revocation, prohibition

¹ National Audit Office. *National Rivers Authority: River Pollution from Farms in England*. 1994-95, HC 235.

²For example, the very successful Oil Care Campaign.

³ Interviews with Agency officers.

⁴ Section 74 EPA 1990.

⁵ See sections 38 EPA 1990 (waste), 12 EPA 1990 (air), Schedule 10 para 6 WRA 1991 (water).

⁶ See sections 14 EPA 1990 (IPC) and 86 WRA 1991 (water).

anticipates putting a freeze on an operator's activities, and therefore has direct implications for profitability.⁷

- **Injunctions** - for the first time, the Agency is given the power to apply for an injunction from the High Court in the stead of prosecution, provided criminal proceedings would not afford an adequate remedy.⁸ High Court powers are generally more extensive and may be suited to deliberate and flagrant breach. This power has been used for the first time against a waste disposal company to compel its compliance with the conditions of its waste management licence.⁹
- **Prosecution** - Court action by the Environment Agency is usually taken in the Magistrates' Courts. Offences attract fines of up to £20,000 in the Magistrates' and/or custodial sentences of up to two years. Fines in the Crown Court are often unlimited.
- **Works Notices** - the water pollution provisions provide that the Agency can conduct anti-pollution works and operations where poisonous, noxious or polluting matter or solid matter is likely to enter, or has entered controlled waters.¹⁰ Costs can be recouped from the person who caused or knowingly permitted the pollution.
- **Enforcement Notices** - Before the 1995 Act, breach of IPC regulations could be tackled by enforcement notices specifying the matters to be addressed by the licence holder. Waste regulation had similar provisions available but only in response to a 'deposit' of waste, after which the authority could direct action to be taken.¹¹ The enforcement notice procedure has finally been extended to water pollution and may be used whenever a pollution incident occurs or is likely.¹² This extension of powers under the Environment Act was unsuccessfully resisted with complaints that it was a sweeping new power with no safeguard against potential misuse.¹³ Failure to comply with the notice requirements is an offence.
- **Cautions** - when an offence has been discovered, the enforcement body may request the offender to accept responsibility for the offence by signing a caution. No legal proceedings will then be taken, but the fact of this caution may be adduced as evidence in the prosecution of later incidents of the defendant's

⁷ One of the rare instances in which a prohibition notice was used was against ICI at Teeside following a leak containing hydrochloric acid mist. See Friends of the Earth press release, 'ICI Teeside Plant Closed Down by Environment Agency,' 5.6.97.

⁸ the power to seek an injunction has existed in air pollution regulation under s.24 EPA 1990 and was used in *Tameside BC v Smith* (1996), but was not previously available in water or waste regulation (excepting local authority powers to act against statutory nuisances).

⁹ Injunction granted by the High Court on 25/7/97 - Agency press release.

¹⁰ Section 161 WRA 1991.

¹¹ Section 59 EPA 1990.

¹² The new s.90B WRA 1991, inserted by Schedule 22 para 142 of the Environment Act.

¹³ HL 14/2/95 col. 611-20.

previous conduct.¹⁴ Cranston's observation on the use of the caution in the field of consumer protection was that it was viewed by officers as fettering discretion. Should the same company commit a similar offence, the enforcement body would feel bound to prosecute, otherwise the threat of cautioning would be undermined.¹⁵ To issue a caution, the Agency must have sufficient evidence to prosecute.

- **Warnings** - these were extensively relied on by the Alkali Inspectorate, although then known as 'infraction letters'. There is no legal duty to comply with a warning.¹⁶ Failure to respond to formal warnings is however frequently relied on in prosecutions as assisting the Agency in demonstrating culpability on the part of the offender.

¹⁴For the rules prescribing when cautions may be issued see Home Office Circular 59/90 as amended by Circular 18/94.

¹⁵ Cranston, R. (1979) *Regulating Business - Law and Consumer Agencies*. Macmillan., at p.102.

¹⁶ R v London WRA ex p. Specialist Waste Management (The Times 1/11/88).



APPENDIX F

RESEARCH METHODOLOGY



RESEARCH METHODOLOGY

16.1 Research Data & Methodology

The conclusions of this research were drawn in particular from: enforcement statistics from the Agency and its predecessors; a survey completed by 100 Agency officers; face to face interviews with 30 Agency officers and five representatives from industry; and information obtained from attending 25 Agency prosecutions. A few comments should perhaps be made at this stage on the reliability of these data sources.

16.1.1 The Meaning of Enforcement Statistics

In relation to the discussion of enforcement style before and after the Agency in chapter 2, it is important to state the approach taken in this research to enforcement statistics as a measure of a regulator's performance or policy.¹ Much academic work on regulation has incorporated enforcement statistics somewhat uncritically, but has neglected to explore the proper significance to be attached to them.

Firstly, it should be noted that although the focus of this thesis is firmly on the enforcement of pollution control law by formal court action, it is not intended here completely to ignore or trivialise the importance of other methods of enforcement. Prosecution statistics do not in any way represent a full picture of the enforcement activities of a particular body, but can shed light on the relative role of prosecution and the less formal enforcement mechanisms, such as negotiation, warnings and notice serving, within those activities. During interviews conducted for this project, enforcement officers were often eager to emphasise that enforcement levels should not be measured by prosecutions alone. One Waste Regulation Officer (WRO) interviewed by the author² told of a local doctor who passed unsold 'prescription only' drugs to the chemist, who had in turn passed them to his assistant for disposal. The young assistant, knowing no better, dumped the drugs in a nearby skip. A member of the public reported the location of the drugs to the Waste Regulation Authority (WRA), and they were traced back to the doctor and chemist.

¹ A collection of enforcement statistics referred to in the course of this research are detailed at Appendix A.

² Walsall, interview with enforcement officers, January 1997.

No prosecutions were taken, despite the technical breach of waste management legislation, and a significant degree of carelessness. It was discovered that the medical profession had not been informed of their environmental responsibilities and that the problem was, therefore, one of ignorance of the law. The WROs arranged the publication of the responsibilities of people in charge of prescription drugs in a leading medical journal. This journal attracted considerable interest and achieved much greater targeted publicity than a single prosecution would have done. This anecdote shows that this instance of ignorance of the law was effectively addressed by non-formal methods.³

This discussion of enforcement drivers should not therefore be seen as assuming that formal enforcement by court action and notice serving is superior to the use of negotiation and persuasion to achieve compliance. Enforcement statistics are not used here as a measure of regulatory performance or success, but merely as a measure of the degree of formal enforcement employed by the pollution control function of the Agency. Placement of an enforcement body at a particular point along the compliance-sanctioning continuum of enforcement styles requires some measurement of the degree of formal enforcement employed by that enforcement body. An ideal measure of the degree of formal enforcement would be constructed out of the formula;

Degree of formal = No. of instances of Unlawful Conduct Proceeded Against
(a)

Enforcement (x)

Total no. of Instances of Unlawful Conduct (b)

Information on *b* in environmental regulation is simply not available in a satisfactory form at this time. Knowland,⁴ in his thesis on water pollution regulation, used *recorded incidents* to devise prosecution rates. Certainly the number of 'incidents' are recorded annually in both waste management⁵ and water pollution regulation.⁶ However, the concept of 'incidents' is not necessarily coextensive with the concept of unlawful acts/activities. A number of factors

³ The WRO's plea that enforcement statistics are not a good indicator of how well a regulatory agency is perceived as performing its enforcement functions is far from unprecedented; *"Enforcement statistics should not be construed as the measure of activity or success of action. Whilst legal proceedings are often necessary...much improvement....results from the patient, painstaking, persuasive efforts of (environmental health) officers."* Institute of Environmental Health Officers, *Annual Report* 1983-84.

⁴ T.J. Knowland, *Changing the Guard: Institutional Change in Water Pollution Control*. PhD Thesis (East Anglia University, 1993) at p.256.

⁵ Figures are available nationally from 1996.

⁶ Figures are available from 1980.

suggest, for example, that incidents are an over-statement of unlawful conduct which can be proceeded against. Firstly, pollution incidents may be lawful if the operator responsible possesses a licence or discharge consent which permits the discharge.⁷ This would be the case particularly with water companies, who often have the protection that, provided their discharges for the year as a whole do not exceed the annual parameters set in the consent, no offence is committed.⁸ Secondly, while 20,000 pollution incidents may have been identified in a year, the operators responsible may not all have been traced. Alternatively, when officers visit the site, they may find that the source of complaint is exempt from regulation, and therefore does not constitute an offence.⁹ A number of the 'incidents' then, may not be capable of leading to any enforcement action.

Conversely, the terminology of 'incidents' may in some respects vastly under-represent the scope of unlawful conduct, as it does not include instances of breach of discharge consent which have not led to identified pollution, or indeed instances of providing false information to the authorities, yet these acts are also unlawful.¹⁰ Agency management acknowledge that even they do not possess the full picture, as it is within the field officer's discretion to ignore a breach or point it out to the operator without officially recording it. The power to abstain from recording a breach of course forms part of the officer's bargaining tools:

*"We conduct a balancing act with large plants. We allow smaller things to go on if they clear up the bigger things."*¹¹

The point being made here is not that the Agency is being in any way under-handed in its collation of statistics, but that in the realms of discretion-based enforcement, recorded statistics can never tell the whole story and will inevitably under-estimate the *breach:prosecution* ratio. Therefore, while it was felt important to incorporate some form of prosecution ratio into this work, it is equally important to point out the limitations of such an exercise.

⁷ See s.88(1)(a) Water Resources Act 1991; and ss.6(1) and 33(1)(a) Environmental Protection Act 1990.

⁸ National Rivers Authority. *Discharge Consents and Compliance Strategy*. (1994) HMSO, pp.42 and 48.

⁹ For example, an activity which is exempt from the waste management licensing requirements under the Waste Management Licensing Regulations 1994. This problem was noted in Lancashire Waste Regulation Authority's Annual Report 1994-95 at p.15.

¹⁰ See for example, s.85(6) Water Resources Act 1991 and s.71 Environmental Protection Act 1990 respectively.

¹¹ IPC Interviewee, June 1998.

It can be seen then, that the use of enforcement statistics collated by environmental regulators is fraught with difficulties. Their techniques of reporting enforcement statistics are diverse and vary across time,¹² and in view of what has been said above, they provide an unsatisfactory measure of unlawful conduct. Grabosky & Braithwaite, in their study of a cross-section of Australian regulatory agencies, chose not to take account of the number of companies within the agencies' jurisdiction when assessing enforcement statistics.¹³ Their view was that each individual agency studied was confronted by an infinite number of offences and therefore; *"variation in prosecution activity is less a function of opportunity than of policy."*¹⁴ This view that fluctuations in formal enforcement activity are the direct result of enforcement policy rather than the prevalence or otherwise of unlawful activities, is persuasive, and to an extent is adopted in this research. Indeed, support for an equation of the number of prosecutions taken and policy, and the existence of infinite deviations from legal requirements, was found from interviews with Agency officers:

*"I could go to any site and each time find something to prosecute. It would be a fairly pointless exercise...you must ask every time 'what's the benefit?' We can usually achieve compliance without prosecution."*¹⁵

Environmental infringements are numerous, and enforcement policies select only a relatively small number to face the full rigour of legal enforcement.¹⁶ In this work, therefore, analysis of enforcement statistics is treated as being capable of demonstrating policy choices and enforcement cultures. However, it is unfair to compare the enforcement statistics of a regulator with a few hundred staff, with the statistics of another which employs several thousand. Manpower and resources are very real constraints on enforcement, and while attributable to the policy preferences of Government, they are a constraint which the agency itself is largely powerless to change. Therefore, Grabosky's view that enforcement statistics

¹² For example, in 1995 the National Rivers Authority extended its threefold categorisation of water pollution incidents to a fourfold system. In 1995, Integrated Pollution Control statistics changed from financial years to calendar years. Centralised efforts to record waste management incidents nationally have only been made since 1996 and do not appear in public documents.

¹³ It would in any case have been futile to attempt to incorporate the number of entities within the Agency's jurisdiction for the purposes of this research. This is because, at least as regards waste and water regulation, almost every company and individual potentially a part of the Agency's regulatory jurisdiction.

¹⁴ P. Grabosky, & J. Braithwaite. *Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies*. (Oxford University Press, 1986) at p.205.

¹⁵ IPC/RSR interviewee, August 1998.

¹⁶ For an example of this, see appendix A which shows the disparity between the number of prosecutions compared to the number of water pollution incidents.

provide a direct insight into enforcement policy, is accepted with some reservation. This work intends to devise enforcement rates where possible, but with the note of caution that the use of 'incidents' as a measure of instances of unlawful conduct has to be unsatisfactory.

16.1.2 Interviewing Agency Officers - The Limitations on Interviews

1. Timing - The research spanned a time of upheaval and continuous reorganisation, during which Agency staff were understandably disorientated and somewhat wary of what the future held. Officers responses in interviews conducted in the first year to eighteen months of the Agency's existence, tended to be pessimistic and critical, but this general feeling of gloom was understandable given the trauma associated with large scale reorganisation. The low morale in the Agency during these times was well documented:

*"The restructuring and events before it have left a legacy of bitterness and low morale which seem set to hobble the organisation for a long way ahead."*¹⁷

Towards the end of the research, however, interviewees appeared to have a more positive outlook and to have developed a greater esteem for the organisation they were a part of.

2. Tendency to Retrospection - As many of the comments made in interview were retrospective accounts of interviewees' experiences, the resulting data may be contaminated by a tendency to present outsiders with a view of decision making that is rationalised in terms of the officially sanctioned framework.¹⁸ Interviews are in this sense inferior to the data produced by observing officers in action. Understandably, however, the Agency was reluctant to authorise intrusive observational research on this basis during such a sensitive phase in its development.¹⁹

¹⁷ "Agency makes a mess of waste." (1998) *ENDS Rep* 280, p.27.

¹⁸ W. G. Carson, "Some Sociological Aspects of Strict Liability." (1977) 33 *Modern Law Review* 396, at p.399.

¹⁹ In the third year of its existence, during the writing up of this research, the Agency appeared in a 'fly on the wall' documentary by the BBC.

16.1.3 Environment Agency Survey - Design & Methodological Considerations²⁰

100 Environment Agency field officers participated in this research by completing an attitude survey.²¹ The survey was designed to assist discussion of enforcement drivers which affect the degree to which the Agency pursues or avoids legalistic enforcement. Studies of administrative discretion which have focused on prosecution have often taken legal departments as their study group.²² Enforcement officers have been chosen as the study group here rather than legally trained personnel for the following reasons:

(i) Prosecutors are the prisoners of the work and judgement of field officers. Judgments concerning the two issues of culpability and severity of incident have dominated pre-Agency enforcement policies.²³ It is the enforcement team rather than the legal department who possess the technical expertise to assess these central issues, whereas the Agency lawyer is rarely knowledgeable in the scientific/technological disciplines of pollution control. Enforcement officer discretion can be seen to be at least as important as that of the legal department, for although their decision to recommend a prosecution usually isn't final, their decision not to pursue court action often is.²⁴

(ii) For the purposes of looking at the differences between waste management, water quality and integrated pollution control, it is the field based officers who have joined the Agency from very different cultural backgrounds. The majority of Agency lawyers are inherited from the water quality sector.²⁵

(iii) It is the officer who visits the site of the offence and who is the first link in the chain in applying the screening operations which determine when to prosecute. He is inevitably influenced in his recommendations by his perceptions of how ready senior enforcement officers, the legal department are to take up his suggestion. He may also consider the personal implications. If a prosecution is pursued at his suggestions, he will generally be required to

²⁰ The survey template and further design considerations are detailed at Appendix B.

²¹ The survey in P. Grabosky, & J. Braithwaite. *Of Manners Gentle - Enforcement Strategies of Australian Regulatory Agencies*. (Oxford University Press, 1986). This study surveyed 87 respondents.

²² This approach was taken for example in J. Fionda, *Public Prosecutors and Discretion: A Comparative Study*. (Clarendon Press, Oxford, 1995).

²³ See for example the National Rivers Authority prosecution policy at 2.1.2.

²⁴ See the discussion of Scheme of Delegation Meetings at 6.3.2.

²⁵ See Appendix A, fig. 12.11 and fig 3.1.

prepare an Incident Report, sometimes assist with preparation of the prosecution bundle, attend court as a witness and perhaps write a short article on the proceedings. This additional workload may present a substantial disincentive to suggest court action.²⁶

At the end of 1997, the Legal Department of the Agency's Head Office supported distribution of the survey after minor revisions. They did, however, express concern that the responses should not in any way be treated as a reflection of Agency policy or practice, but merely as the individual views of respondent officers.

While this study is intended to make a general contribution to the literature on enforcement style, it is perhaps more appropriate to adopt the term 'enforcement culture.' The surveys and interviews are distanced from Agency practice, therefore, the impressions obtained during this research are heavily dependent on officer interpretation and perspective. The label of 'enforcement culture' is more capable of reflecting the fact that this section of the research is primarily based on opinions and attitudes which is possibly distinct from action and practice. However, an individual officer's responses will inevitably to a degree, be influenced by the matters he has recently been involved with, therefore taking the samples as a whole, it is hoped that a fairly general insight into the dominant cultures of enforcement should be obtained. The survey uses closed questions (as these are easiest to quantify) with the intention that the survey outcomes could be elaborated upon with the assistance of interviews with enforcement personnel.

16.1.4 The Limitations of Courtroom Observation

During the course of this research, a total of 25 Agency prosecutions were attended with a view to finding out more about the prosecution process in environmental cases, the arguments used in defence and mitigation and also with the hope of meeting useful contacts.²⁷ A positive methodological point can be made about this form of data, and this is that courtroom observation is unlikely to be hampered by observer effects interfering with results. On the negative side, although the choice of cases attended was intended to be indiscriminate, it was inevitably subject to 'selection' factors in that the author relied on the Agency providing information on imminent court cases. Additionally, from a practical point of view, the hearings had

²⁶ Information provided by enforcement officer at court hearing, August 1997.

²⁷ The cases attended are listed in Appendix C.

to be within reasonable travelling distance. This meant that the majority of cases observed were from the Agency's North West region, which stretches from Carlisle to South Manchester, although a few were from the Midlands region. The environment of the North West region features the Mersey Basin (once labelled the most polluted major river catchment in the UK²⁸), poor sewage and sewerage facilities, a quarter of Britain's chemical plants, intensive agriculture in parts of Lancashire and Cumbria and several nuclear licensed sites. The North West region can therefore be expected to offer a reasonable cross-section of typical case profiles.²⁹

It is recognised that the result of drawing from surveys, interviews and courtroom observation for obtaining original research material, may be seen as representing a somewhat 'scatter-gun' approach to data collection. This approach is the result of the difficulties encountered in obtaining an inside perspective of Agency enforcement. Understandably, the Agency was reluctant to approve the more intrusive, 'fly on the wall' forms of research, particularly at such a vulnerable stage in its development. It is hoped that the somewhat fragmented approach to this research does not over-prejudice its validity.

²⁸ Environment Agency (1996). *Environmental Protection & Pollution Control (North West)*.

²⁹ Although there has been some suggestion that the North West region takes less formal proceedings. See (1997) *ENDs Rep* May, p.26 and A. Mehta, "IPC Penalties and Deterrents: The View from Industry." (1997) 9(6) *Environmental Law & Management*. 274, at p.69.

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